Petition

81-549

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. .....

STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents DR. HOWARD A. TANNER, DR. HENRY VONDETT and GEORGE DAHL in their official capacities,

Petitioners,

v

UNITED STATES OF AMERICA, BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, 13th JUDICIAL CIRCUIT COURT OF THE STATE OF MICHIGAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PRIOR TO JUDGMENT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General
525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1981

QUESTIONS FOR REVIEW

I.

DO RESPONDENT INDIAN TRIBES POSSESS FISHING RIGHTS IN GREAT LAKES WATERS CEDED BY TREATIES OF 1836 AND 1855?

II.

IF RESPONDENT TRIBES POSSESS SUCH FISHING RIGHTS, DO THE STATE OF MICHIGAN AND STATE COURTS NEVERTHELESS POSSESS AUTHORITY AND JURISDICTION TO EXERCISE REASONABLE REGULATION IN THE INTEREST OF CONSERVATION?

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	i
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
TREATIES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THE COURT OF APPEALS "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS . . . AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	10
II. THE ISSUE OF WHETHER INDIAN TRIBES POSSESS FISHING RIGHTS IN GREAT LAKES WATERS CEDED UNDER TREATIES OF 1836 AND 1855 PRESENTS "AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED IN THIS COURT."	15
III. IN PLACING LIMITATIONS UPON THE STATE'S AUTHORITY TO REGULATE INDIAN FISHING, THE LOWER COURTS HAVE DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE MICHIGAN SUPREME COURT AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	18
CONCLUSION AND RELIEF SOUGHT	20

INDEX OF AUTHORITIES

Cases	Pages
Antoine v Washington, 420 US 194 (1975)	19
Bay Mills Indian Community, et al v United States of America, (docket nos. 18E, 58) 7 Indian Claims Commission 576 (1959); 20 ICC 137 (1968); 26 ICC 538 (1971)	17
Department of Game of Washington v Puyallup Tribe (Puyallup II), 414 US 44 (1973)	19
Mescalaro Apache Tribe v Jones, 411 US 145 (1973)	19
Organized Village of Kake v Egan, 369 US 60 (1962)	19
Ottawa and Chippewa Indians v United States, 42 Court of Claims 240 (1907)	17
People v LeBlanc, 399 Mich 31; 248 NW2d 199 (1976)	6, 9, 12, 18
Puyallup Tribe v Department of Game of Washington (Puyallup I), 391 US 392 (1968)	19
Puyallup Tribe v Washington Game Department (Puyallup III), 433 US 165 (1977)	19
State of Montana v United States, ... US ....; 67 L Ed 2d 493 (1981)	20
State of Washington v Washington State Commercial Passenger Fishing Vessel Assn, 443 US 658 (1979)	19
United States of America v State of Michigan, 471 F Supp 192 (WD Mich, 1979)	1, 5
United States of America v State of Michigan, 505 F Supp 467 (WD Mich, 1980)	2, 8
United States of America v State of Michigan, 623 F2d 448 (CA 6, 1980)	2, 8

Pages

Statutes

28 USC § 1254(1) 3

28 USC § 1331 3

28 USC § 1337 3

28 USC § 1345 3

28 USC § 1362 3

28 USC § 1651(a) 8

28 USC §§ 2201 and 2202 3

Other Source

25 CFR part 256, subpart D, 44 Fed Reg 65747 (immediately effective November 16, 1979), revised 45 Fed Reg 28100 (April 28, 1980) 7

7 Stat 491 3

11 Stat 621 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. .....

STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents DR. HOWARD A. TANNER, DR. HENRY VONDETT and GEORGE DAHL in their official capacities,

Petitioners,

v

UNITED STATES OF AMERICA, BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, 13th JUDICIAL CIRCUIT COURT OF THE STATE OF MICHIGAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PRIOR TO JUDGMENT

OPINIONS BELOW

The judgment of the United States District Court for the Western District of Michigan declaring that the Plaintiff tribes pursuant to treaty possess fishing rights in portions of the Great Lakes and that any State laws or regulations inconsistent therewith are void *ab initio* is included in the appendix to this Petition, App. 18a, and is reported at *United States of America* v *State of Michigan*, 471 F Supp 192 (WD Mich, 1979). In a subsequent reported opinion the District Court

denied the State's request for a stay pending appeal. *United States of America* v *State of Michigan*, 505 F Supp 467 (WD Mich, 1980) App. 229a.

Beginning in late 1979 the Court of Appeals issued a series of unreported orders which stayed various injunctive orders entered by the District Court and discussed issues relevant to the instant case: App. 204a (order dated September 20, 1979); App. 223a (order dated October 19, 1979); App. 226a (order dated November 28, 1979). On May 28, 1980, the Court of Appeals entered an opinion remanding the case to the District Court for consideration of three specified pre-emption questions, but retaining jurisdiction, App. 292a *United States of America* v *State of Michigan*, 623 F2d 448 (CA 6, 1980). Two days later, on May 30, 1980, the District Court's denial of a stay was overturned by the unreported Court of Appeals order granting a stay, App. 302a. This stay order was modified in subsequent unreported orders of July 16, 1980 (App. 306a) and July 10, 1981 (App. 311a). No judgment was entered on any of these orders, but on August 11, 1981, the Court of Appeals issued its July 10, 1981 order as the Court's mandate, App. 311a. One week later, on August 18, 1981 the District Court issued an opinion and order (App. 316a) concluding that the Court of Appeals remand order entered May 28, 1981 (App 292a; 623 F2d 440) and modified and continued in effect on July 16, 1980 (App. 306a) and July 10, 1981 (App. 311a) is moot.

JURISDICTION

The District Court Judgment was entered May 7, 1979 and a timely notice of appeal was filed on July 2, 1979. Although the Court of Appeals has not entered a judgment in this case pursuant to Fed R App P 36, the order of July 10, 1981 (App. 311a) was issued as the mandate on August 11, 1981 (App. 315a), apparently indicating the Court's position that the

July 10, 1981 order is a final judgment. It is unclear whether judgment has been rendered, but the jurisdiction of this Court to review the entire case is invoked under 28 USC § 1254(1).

TREATIES INVOLVED

This case involves interpretation of the 1936 treaty with the Ottawa, etc., 7 Stat 491, and the treaty with the Ottawa and Chippewa of 1855, 11 Stat 621, both of which are reproduced in full in App. 1a, 9a. The following articles are of particular importance:

Treaty with the Ottawa, etc., 1836, Art. 13:

> "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."

Treaty with the Ottawa and Chippewa, 1855, Art. 3:

> "The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; . . . ."

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought under 28 USC §§ 1331, 1337, 1345, 1362, 2201, and 2202 by the United States on its own behalf and on behalf of two

Indian tribes and by the two tribes themselves against the State of Michigan, its Natural Resources Commission, and certain named State officials seeking a determination as to whether certain alleged aboriginal and treaty fishing rights exist in waters of the upper Great Lakes and whether the State of Michigan has authority to regulate Indian fishing.

It is difficult to determine who made the first overtures to sell Indian land in Michigan. It is known that by late 1835 both the Ottawa and Chippewa Indians in northern Michigan were interested in selling their lands in order to obtain financial annuities and services such as blacksmiths and that the United States was interested in obtaining land cessions from the Indians. In the fall of 1835, a small group of Indians made their way to Washington, D.C. to talk to government officials about a treaty. The United States was interested in obtaining larger land cessions than were available from this group of Indians and so a larger treaty meeting was proposed. Instructions were sent to Indian agents in Michigan to arrange for a larger delegation of Indian chiefs in order to negotiate a treaty. In March, 1836, a group of approximately 25 Indian chiefs from various bands of Michigan Indians arrived in Washington, D.C., accompanied by escorts consisting of traders and others known to the Indians. A guideline for the treaty meeting itself included the following directive from Lewis Cass, the Commissioner of Indian Affairs, to Henry Schoolcraft, the principal negotiator of the treaty: "The great object will be to do full justice to the Indians, and, at the same time, to procure the land upon proper and reasonable terms for the United States." The treaty negotiations commenced on March 14, 1836 and concluded on March 28, 1836 at which time all of the chiefs and delegates signed the treaty document. The treaty was subsequently amended in part by the United States Senate and Indian chiefs were later assembled at Mackinac Island in order to obtain their assent to the amendments. By July 16, 1836, the signatures of 96

chiefs were received assenting to the amendments. A copy of the treaty as amended is set forth at App. 1a.

The treaty of 1836 provides for the sale and cession by the Indians to the United States government of a tract of land described in Art. 1 of the treaty. See the map, App. 194a. Other articles of the treaty provided for certain reservations to be held by the Indians for five years for the payment of certain annuities and the provision of services, for the payment of certain debts of the Indians, for payments to certain half-breed relatives of the Indians, and for investigation of the removal of the Indians from Michigan to areas west of the Mississippi River.

The treaty of 1855 (App. 9a) was the result of a desire on the part of the Indians and the government that disputes arising from several previous treaties be resolved and a desire on the part of the Indians to hold individual title to land. Among the principal reasons for the 1855 treaty was the desire to settle other debts and the desire for the Indians to obtain money in exchange for releasing the United States from former treaty obligations.

The original complaint in this case was filed in 1973, amended complaints and answers were filed in 1975 and 1976 and trial was conducted between February 1978 and February 1979. In an opinion (App. 18a), *United States of America* v *State of Michigan*, 471 F Supp 192 (WD, Mich 1979), and Declaratory Judgment and Decree (App. 195a), 471 F Supp at 278, the District Court declared that the Plaintiff Indian tribes were the successors in interest to the signatories of the treaties in question, that they possessed fishing rights in the waters of the Great Lakes included in the territory ceded by the treaties, and that any State statutes and regulations inconsistent with such rights were void *ab initio*. Petitioners filed

a timely notice of appeal which was docketed in the Court of Appeals as case no. 79-1414.

In August 1979 a lawsuit was instituted in a Michigan Circuit Court by a group of sports fishermen and an injunction was obtained prohibiting all fishing with gill nets in Grand Traverse Bay in the northwest portion of Michigan's Lower Peninsula. In September 1979 Respondents obtained a temporary restraining order and preliminary injunction from the United States District Court for the Western District of Michigan enjoining further proceedings in the state court litigation. The Plaintiffs in the State court action and the State court judges filed appeals which were docketed in the Sixth Circuit as cases no. 79-1527, 79-1528, and which were subsequently consolidated with the pending appeal filed by the State of Michigan. On September 20, 1979 and October 19, 1979 the Sixth Circuit entered orders granting a stay of the District Court's injunction pending appeal, App. 204a, 223a. In its order of October 19, 1979 the Court of Appeals concluded that unregulated gill net fishing by members of the Respondent tribes posed a strong possibility of irreparable damage, App. 224a.

> "We find on the basis of the record now before us that unless the order is stayed there is a strong possibility that the fishery, the fish supply and spawning grounds in Grand Traverse Bay will be irreparably damaged or destroyed by continued intensive gill net fishing."

The Court of Appeals also concluded that the reasoning of a Michigan Supreme Court opinion, *People* v *LeBlanc,* 399 Mich 31; 248 NW2d 199 (1976) (which had previously been rejected by the District Court) was more persuasive than the reasoning of the District Court, App. 225a.

On October 26, 1979 the District Court entered an order prohibiting the State from enforcing fishing regulations against

a group claiming treaty fishing rights who were not a party to the lawsuit. The State of Michigan appealed that order and sought a stay which was granted by the Court of Appeals on November 23, 1979, App. 226a. In its order of November 28, 1979 the Court of Appeals concluded that continued intensive gill net fishing by members of Plaintiff tribes posed a strong possibility of irreparable damage throughout the Great Lakes as well as in Grand Traverse Bay, App. 228a:

> "Judge Fox's order of October 26, 1979 is hereby stayed pending disposition of the appeals in nos. 79-1414 and 79-1527 for the reasons stated in our order of October 19, 1979 and for the further reason that, based on the record now before us, it appears that the same considerations apply in other areas of the Great Lakes as apply in Grand Traverse Bay, which was the subject of our stay of October 19, 1979. On the basis of the record now before us, there is a strong possibility that fisheries, fish supplies and spawning grounds in other areas of the Great Lakes will be irreparably damaged or destroyed by continued intensive gill net fishing."

Not long after the Court of Appeals issued these orders which first indicated disapproval of the rationale and rulings of the District Court, but many months after entry of the District Court's judgment, 471 F Supp 192, so-called "emergency" federal regulations were promulgated by Respondent United States of America which purported to govern fishing by Respondent tribes. 25 CFR part 256, subpart D, 44 Fed Reg 65747 (immediately effective November 16, 1979), revised 45 Fed Reg 28100 (April 28, 1980). At oral argument in the Court of Appeals on February 15, 1980 the United States and the tribes relied heavily on the existence of these post-judgment regulations as a separate and alternative basis (in addition to the treaty interpretation issue raised by the

State's appeal) for their contention that the State was without authority to regulate fishing by Respondent tribes.

On May 9, 1980 the District Court entered an opinion and order (*United States of America* v *State of Michigan*, 505 F Supp 467 (WD Mich, 1980), App. 229a) denying the State's motion for stay of judgment pending appeal. A few weeks later, on May 28, 1980, the Court of Appeals entered an opinion remanding the case to the District Court for consideration of the preemptive effect of Respondents' so-called "emergency" post-judgment federal regulations. *United States of America* v *State of Michigan*, 623 F2d 448 (CA 6, 1980), App. 292a. Two days later the Court of Appeals entered an order overruling the District Court's May 9 order and granting a stay of the judgment pending final disposition of the appeal, App. 302a. In a subsequent order dated July 16, 1980 the Sixth Circuit modified its stay order to incorporate the terms of Respondents' post-judgment regulations, App. 306a. The State filed a motion pursuant to 28 USC § 1651(a) in this Court to vacate the Court of Appeals order, but the motion was denied by Mr. Justice White on August 4, 1980. *Michigan, et al* v *United States*, docket no. A-84. Hearings on the remanded issues were conducted in the District Court between September and December, 1980.

On April 21, 1981 the Secretary of the Interior notified Petitioners and Respondent tribes that the federal regulations would not be extended beyond their May 11, 1981 expiration date because evaluation by the Fish and Wildlife Service indicated that the regulations ". . . may be failing to protect the fisheries which are vital to Indians and non-Indians alike." App. 309a. The State of Michigan then filed emergency motions in the Court of Appeals seeking to set aside its remand order since the preemption questions were moot and no longer justiciable and to modify the stay to permit State regulation consistent with the principles enunciated by the Michigan

Supreme Court in *People* v *LeBlanc, supra,* the reasoning of which had been held "persuasive" by the Court of Appeals in its order of October 19, 1979, App. 225a.

Following briefing and oral argument the Court of Appeals entered an order on July 10, 1981 which, in effect, denied the State's motions and modified and continued in effect the earlier remand opinion and orders of the Court, App. 314a, 315:

> "The remand opinion and orders of the Court dated May 28, 1980, and July 16, 1980 remain in effect except as modified by this order.
>
> "• • •.
>
> "Accordingly the remand order of this Court embodied in our opinion at 623 F2d 448 (6th Cir. 1980) is continued in effect as modified by this order."

The remand order to which the Court referred, 623 F2d at 450, says as follows in pertinent part, App. 296a, 297a.

> "For these reasons, we remand the case to the District Court for consideration of the preemptive effect of the new federal regulations. • • •
>
> "Accordingly, the case is remanded to the District Court for consideration of this question. This Court retains jurisdiction of the other questions presented by the case pursuant to 28 USC § 2106 and continues in effect the stay heretofore entered."

Thus in its July 10, 1981 order, which was simply the most recent in a long series of orders dealing with stays and remands, the Court of Appeals incorporated the terms of the expired federal regulations as the terms of the stay pending final dis-

position of the case based upon Respondents' representations that those terms had been adopted and would be carefully enforced as a regime of tribal self-regulation.

No judgment was entered pursuant to Fed R App P 36, but on August 11, 1981 the Court of Appeals purported to issue its July 10, 1981 order as the mandate, App. 315a.

One week later, on August 18, 1981, the District Court entered an opinion and order concluding that the Court of Appeals remand was moot, App. 316a.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS . . . AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION."

Supreme Court Rule 17.1(a)

Perhaps the best example of the Court of Appeals' departure from the accepted and usual course of judicial proceedings is the fact it is impossible to determine whether there has been a judgment and, if there has, the extent to which the District Court has been affirmed, modified or reversed. For six years this case has been vigorously litigated in the District Court, culminating in hundreds of exhibits, thousands of pages of transcript, and two opinions comprising more than 120 published pages in the Federal Supplement. After two years in the Court of Appeals, hundreds of pages of briefs have been filed, two oral arguments have been held, stays and remands

have been entered and modified and a mandate has issued. However, the Court of Appeals has not discussed any of the evidence adduced at trial, none of the Court of Appeals' orders contain any meaningful discussion of the facts of the case or the legal theories raised in the appeal, and no judgment has been entered pursuant to Fed R App P 36. Nevertheless, the Court of Appeals apparently considers the case closed and the District Court appears to have assumed perpetual jurisdiction to regulate fishing in the Great Lakes, App. 329a.

Determination of this case without a ruling on the merits is merely the most recent action by the Court of Appeals in derogation of the accepted and usual course of judicial proceedings. For example, this case was tried in the District Court and brought to the Court of Appeals solely on a question of treaty interpretation. After the District Court judgment and after the Court of Appeals issued interlocutory orders expressing disagreement with the District Court's rationale, Respondents manufactured so-called "emergency" interim regulations purporting to regulate Indian fishing and asserted them as an alternate independent basis for arguing that Petitioner State of Michigan was without authority to regulate Indian fishing. Not only did the Court of Appeals defer determination of the State's appeal until the District Court could hold hearings on the validity of the newly-manufactured regulations, it ordered them to be implemented while their validity was being litigated. After having been in force for 15 months, Respondent United States concluded that the regulations may not be adequate to protect the fishery and so declined to extend them, but the Court of Appeals nevertheless ordered the regulations to remain in effect while the litigation was pending, App. 314a.

In its most recent order of July 10, 1981 the Court of Appeals has again departed from the accepted and usual course of judicial proceedings. For example, in the first num-

bered paragraph of the order (App. 312a) the Court refers to treaty guaranteed fishing rights, aboriginal rights and federally-created and federally-protected rights. This confusing amalgam of different legal theories leaves the State of Michigan totally at a loss to understand the basis for the Court's ruling. The absence of discussion of the facts of this case and controlling legal principles makes it impossible to determine to what extent the District Court judgment has been affirmed, modified or reversed. In paragraph numbered two of the July 10th order the Court refers to the Michigan Supreme Court decision in *People* v *LeBlanc, supra,* and purports merely to follow it, but even a cursory comparison of the *LeBlanc* decision with the Court of Appeals order indicates that the Court of Appeals has far exceeded *LeBlanc* and applied a much stricter standard. The Michigan Supreme Court in *LeBlanc* said, 399 Mich at 64:

> "In the light of these cases, we conclude that on remand, the district court should uphold defendant's conviction for fishing with an illegal device only if:
>
> "1) The prohibition of the gill net is necessary for the preservation of the fish protected by the regulation;
>
> "2) The application of this prohibition to the Chippewas is necessary for the preservation of the fish protected;
>
> "3) And the regulation does not discriminate against the Chippewas."

The Court of Appeals, on the other hand, while stating that the *LeBlanc* decision "accurately states the rule of reason and the principles of federal law applicable to this case" applied a much stricter standard, App. 313a:

> "As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen."

Petitioners submit that the stricter standard applied by the Court of Appeals is not supported by the *LeBlanc* decision, is not supported by previous decisions of this Court and, indeed, is supported only by principles espoused in Respondents' briefs and the erroneous judgment of the District Court. If this new standard is to be extrapolated from prior cases, surely an analysis and explanation should be given.

The Court of Appeals July 10, 1981 order says that the State of Michigan may not regulate Indian fishing if such fishing is not likely to cause irreparable harm and further says that the parties have not introduced proof on this subject, App. 313a-314a. Such a statement contradicts the Court of Appeals own orders of October 19, 1979 (App. 223a); November 28, 1979 (App. 226a); May 30, 1980 (App. 302a); and July 16, 1980 (App. 306a) in which it granted stays because the State of Michigan had in fact demonstrated the likelihood of irreparable injury.

The District Court in its Opinion and Order of August 18, 1981 also appears to have disregarded the accepted and usual course of judicial proceedings by issuing an order declaring that the Court of Appeals remand order was moot (App. 328a) despite the fact that the Court of Appeals had rejected that very argument when propounded by the State of Michigan. In its July 10, 1981 order the Court of Appeals refused to set aside its remand order and said, App. 314a:

"The remand opinion and orders of this Court dated May 28, 1980 and July 16, 1980 remain in effect except as modified by this order."

The effect of the Court of Appeals interpretation of its July 10, 1981 order, and the District Court's August 18, 1981 opinion and order, is that without deciding the merits of the issues raised by Petitioner's appeal, *the Court of Appeals has remanded the case to the District Court solely for consideration of three specified preemption questions, has issued a mandate and considers the appeal concluded while the District Court has ordered that the remanded issues are moot and purports to assume perpetual jurisdiction over regulation of fishing throughout Michigan's territorial waters in the Great Lakes.* The termination of an appeal in such a manner is an avoidance of the Court of Appeals' duty to decide appeals in a reasoned manner consistent with the Federal Rules of Appellate Procedure which this Court has issued.

In the event that the July 10, 1981 order of the Court of Appeals is not a judgment, even though the Court of Appeals has purported to issue a mandate upon that order, it is apparent that the instant case satisfies the criteria of Supreme Court Rule 18 for certiorari to review a case pending in a Court of Appeals before judgment is given. The issues raised in this case—whether there is an Indian treaty fishing right and whether the State has any authority to regulate the exercise of that right—are of paramount public importance, and the erroneous nature of the District Court judgment and the failure of the Court of Appeals to render a judgment justify the deviation from normal appellate practice and require immediate settlement in this Court. The questions involved are of imperative public importance not only to the instant parties, but to all of the citizens of Michigan, the citizens of the entire Great Lakes region (the Great Lakes are bordered by eight states lying within five separate federal circuits), and indeed

to the nation as a whole. The Great Lakes and the fishery resource they contain are a national treasure without equal anywhere in the world. The decision in this case will determine the authority to control utilization of that resource and thus presents issues of vast importance. Are the Great Lakes fishery resources to be controlled by the District Court, Indian tribes, the State of Michigan (and other Great Lakes states), the federal government, or some sort of consortium of these entities? The erroneous nature of the District Court judgment and the failure of the Court of Appeals to issue a reasoned judgment affirming, modifying or reversing the District Court has resulted in extraordinary confusion regarding the authority to enforce fishing regulations in the Great Lakes, and with no effective regulation, the fishery resource is threatened with immediate irreparable harm and complete depletion soon.

In summary, this Court should grant certiorari to review the entire case to correct the lower courts' failure to follow the accepted and usual course of judicial proceedings and in order to render final judgment on the important legal issues presented.

II.

THE ISSUE OF WHETHER INDIAN TRIBES POSSESS FISHING RIGHTS IN GREAT LAKES WATERS CEDED UNDER TREATIES OF 1836 AND 1855 PRESENTS "AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT."

Supreme Court Rule 17.1(c)

By the terms of the treaty of 1836, large portions of territory were ceded to the United States and ultimately became part of the State of Michigan which entered the Union the next year in 1837. Article 13 of the 1836 treaty included a provision

by which the Indians stipulated "for the right of hunting on the lands ceded with the other usual privileges of occupancy until the land is required for settlement." It is not disputed that the phrase "usual privileges of occupancy" encompasses fishing, but Petitioners submit that the interpretation of the treaty presents an important question of federal law which was wrongly decided by the District Court, has not been addressed by the Court of Appeals and which has not been, but should be, settled by this Court.

The treaty interpretation questions are important because of the geographic scope and economic significance of the purported fishing rights. Respondents claim a fishing right, free from State regulation, throughout vast portions of the Great Lakes, far beyond the bounds of any reservation. The purported right is worth hundreds of thousands of dollars annually to Respondent tribal members and the exercise of that purported right by Respondents has had a significant deleterious impact upon the resource itself and upon the multi-million dollar commercial and recreational fishing programs of the State of Michigan. The State maintains that Respondents exercising purported treaty rights engage in indiscriminate fishing operations, particularly with lethal non-selective gill nets, which, if continued unchecked by State regulation, will lead to irreparable depletion of the fishery resource throughout the Great Lakes.

Interpretation of Indian treaties is, of course, a federal question which, in an individual case, may depend to a great extent on the intent of the signatories. The State submits that the District Court disregarded properly admitted evidence, relied on inadmissible material, and engaged in a wide-ranging attack on the non-Indian participants to the treaty negotiation process which is completely without support in the record and which resulted in erroneous factual findings and incorrect conclusions of law. When the treaty language is analyzed under correct

legal principles according to the true intent of the parties as disclosed by the record, it is clear that none of the parties contemplated the unlimited and perpetual fishing right which the District Court declared to exist. The State submits that any fishing right retained or created by the 1836 treaty expired shortly thereafter when "the land [was] required for settlement." Alternatively, the Petitioners submit that the treaty of 1855 operated to extinguish any fishing right which survived until that time. Alternatively, the State submits that by virtue of prior litigation in the United States Court of Claims and the Indian Claims Commission, Respondents may not argue that they retain any enforceable fishing rights. See *Bay Mills Indian Community, et al* v *United States of America,* (docket nos. 18E, 58) 7 Indian Claims Commission 576 (1959); 20 ICC 137 (1968); 26 ICC 538 (1971) and *Ottawa and Chippewa Indians* v *United States,* 42 Court of Claims 240 (1907). While the existence of the specific fishing right claimed in the instant case was not technically at issue in that prior litigation, Petitioners submit that the arguments made by the tribes and the adjudications rendered in those cases compel rejection of Respondents' purported right in the instant case.

Even if a fishing right is deemed to exist, the State submits that the District Court improperly concluded that the instant Respondents may enforce the right. In an order entered July 30, 1976 the District Court limited the issues to be tried to the question of the existence of a treaty right and the jurisdiction of the State to regulate the exercise of those rights. The State was prohibited from discovery and adducing evidence on the question of which Indians, if any, were entitled to assert the purported treaty right. Despite the District Court's limitation of the issues and prohibition against Petitioners adducing evidence on the question, the Court nevertheless erroneously concluded that Respondents could assert the treaty rights.

III.

IN PLACING LIMITATIONS UPON THE STATE'S AUTHORITY TO REGULATE INDIAN FISHING, THE LOWER COURTS HAVE DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE MICHIGAN SUPREME COURT AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Supreme Court Rules 17.1(a), 17.1(c)

In 1976 the Michigan Supreme Court in *People* v *LeBlanc, supra,* 399 Mich at 64, cited numerous decisions of this Court and concluded that State regulations banning the use of gill nets could be applied to a member of one of Respondent tribes if:

> "(1) The prohibition of the gill net is necessary for the preservation of the fish protected by the regulation; (2) the application of this prohibition to the Chippewas is necessary for the preservation of the fish protected; (3) and the regulation does not discriminate against the Chippewas."

Three years later the District Court declared the existence of a fishing right and concluded that all State statutes and regulations which interfered with the right were void *ab initio.* 471 F Supp at 281; App. 202a. Most recently, in its order of July 10, 1981, the Court of Appeals purported to adopt the standard enunciated in *People* v *LeBlanc, supra,* but in reality imposed a much harsher burden upon the State:

> "The State bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for

regulation exists. In the absence of such a showing, the State may not restrict Indian treaty fishing, including gill net fishing," App. 313a.

"Only upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit State regulation of gill net fishing," App. 314a.

"As provided in [*People* v *LeBlanc, supra*] any such State regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen." App. 313a.

Assuming that an Indian fishing right exists, the extent to which that right may be regulated by the State in the Courts of Michigan presents a federal question which, the State submits, the lower courts have decided in a way in conflict with the Michigan Supreme Court and applicable decisions of this Court. In a long line of cases this Court has held that even where Indian treaty fishing rights exist, the State may nevertheless regulate in the interest of conservation particularly when the activity to be regulated occurs off-reservation. See *Puyallup Tribe* v *Department of Game of Washington* (Puyallup I), 391 US 392 (1968); *Department of Game of Washington* v *Puyallup Tribe* (Puyallup II), 414 US 44 (1973); *Antoine* v *Washington*, 420 US 194 (1975); *Puyallup Tribe* v *Washington Game Department* (Puyallup III), 433 US 165 (1977); *State of Washington* v *Washington State Commercial Passenger Fishing Vessel Assn*, 443 US 658 (1979); *Organized Village of Kake* v *Egan*, 369 US 60 (1962); *Mescalaro Apache*

Tribe v *Jones*, 411 US 145 (1973); *State of Montana* v *United States*, ... US ....., 67 L Ed 2d 493 (1918).

The District Court rejected any State authority to regulate and the Court of Appeals misconstrued decisions from this Court and applied an unduly restrictive burden of proof before State regulation can occur. The State of Michigan maintains that tribal self-regulation and regulation under the now-expired federal regulations are inadequate to protect the fishery resource. Under the incorrect legal standards enunciated by the courts below, it is virtually impossible for the State to make the required showing in order to enforce State fishing regulations. It is therefore necessary for this Court to grant certiorari in order to correct the lower courts and enunciate the appropriate standards for State regulation of Indian treaty fishing.

CONCLUSION AND RELIEF SOUGHT

Because of the importance of the issues presented, the erroneous nature of the decisions below, and the lower courts' departure from the accepted and usual course of judicial proceedings, a writ of certiorari should issue to review this case.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General
525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

APPENDIX

TABLE OF CONTENTS

		Page
1.	1836 Treaty with the Ottawa, etc., 7 Stat 491 (Signatures, schedule and supplemental Article omitted.)	1a
2.	1855 Treaty with the Ottawa and Chippewa (Signatures omitted.)	9a
3.	District Court Judgment, *United States of America* v *State of Michigan*, 471 F Supp 192 (W.D. Mich, 1979)	18a
4.	Court of Appeals Stay Order, Opinion and Exhibits, September 20, 1979	204a
5.	Court of Appeals Stay Order, October 19, 1979	223a
6.	Court of Appeals Stay Order, November 28, 1979	226a
7.	District Court Opinion Denying Stay, *United States of America* v *State of Michigan*, 505 F Supp 467 (W.D. Mich, 1980)	229a
8.	Court of Appeals Remand Opinion, *United States of America* v *State of Michigan*, 623 F2d 448 (CA 6, 1980)	292a
9.	Court of Appeals Order Denying Stay, December 5, 1979	298a
10.	Court of Appeals Order Denying Stay, December 14, 1979	300a
11.	Court of Appeals Order Granting Stay, May 30, 1980	302a
12.	Court of Appeals Order Modifying Stay, July 16, 1980	306a
13.	Secretary of Interior Letter, April 21, 1981	309a
14.	Court of Appeals Order Continuing Remand, July 10, 1981 (Issued as Mandate, August 11, 1981)	311a
15.	District Court Opinion and Order on Remand, August 18, 1981	316a

TREATY WITH THE OTTAWA, ETC., 1836.

Articles of a treaty made and concluded at the city of Washington in the District of Columbia, between Henry R. Schoolcraft, commissioner on the part of the United States, and the Ottawa and Chippewa nations of Indians, by their chiefs and delegates.

ARTICLE FIRST. The Ottawa and Chippewa nations of Indians cede to the United States all the tract of country within the following boundaries: Beginning at the mouth of Grand river to Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago of the 29th of August 1821, thence, in a direct line, to the head of Thunder-bay river, thence with the line established by the treaty of Saganaw of the 24th of September 1819, to the mouth of said river, thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, thence northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's, to a point in Lake Superior north of the mouth of *Gitchy Seebing*, or Chocolate river, thence south to the mouth of said river and up its channel to the source thereof, thence, in a direct line to the head of the *Skonawba* river of Green bay, thence down the south bank of said river to its mouth, thence, in a direct line, through the ship channel into Green bay, to the outer part thereof, thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east to the place of beginning, at the cape aforesaid, comprehending all the lands and islands, within these limits, not hereinafter reserved.

ARTICLE SECOND. From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts for the term of five years from the date of

the ratification of this treaty, and no longer; unless the United States shall grant them permission to remain on said lands for a longer period, namely: One tract of fifty thousand acres to be located on Little Traverse bay: one tract of twenty thousand acres to be located on the north shores of Grand Traverse bay, one tract of seventy thousand acres to be located on, or, north of the *Pieire Marquetta* river, one tract of one thousand acres to be located by Chingassanoo,—or the Big Sail, on the Cheboigan. One tract of one thousand acres, to be located by Mujeekewis, on Thunder-bay river.

ARTICLE THIRD. There shall also be reserved for the use of the Chippewas living north of the straits of Michilimackinac, the following tracts for the term of five years from the date of the ratification of this treaty, and no longer, unless the United States shall grant them permission to remain on said lands for a longer period, that is to say: Two tracts of three miles square each, on the north shores of the said straits, between *Point-au-Barbe* and *Mille Coquin* river, including the fishing grounds in front of such reservations, to be located by a council of the chiefs. The Beaver islands of Lake Michigan for the use of the Beaver-island Indians. Round island opposite Michilimackinac, as a place of encampment for the Indians, to be under the charge of the Indian department. The islands of the *Chenos,* with a part of the adjacent north coast of Lake Huron, corresponding in length, and one mile in depth. Sugar island, with its islets, in the river of St. Mary's. Six hundred and forty acres, at the mission of the Little Rapids. A tract commencing at the mouth of the *Pississowining* river, south of Point Iroquois, thence running up said stream to its forks, thence westward, in a direct line to the Red water lakes, thence across the portage to the Tacquimenon river, and down the same to its mouth, including the small islands and fishing grounds, in front of this reservation. Six hundred and forty acres, on Grand island, and two thousand acres, on the main land south of it. Two sections, on the northern extremity of

Green bay, to be located by a council of the chiefs. All the locations, left indefinite by this, and the preceding articles, shall be made by the proper chiefs, under the direction of the President. It is understood that the reservation for a place of fishing and encampment, made under the treaty of St. Mary's of the 16th of June 1820, remains unaffected by this treaty.

ARTICLE FOURTH. In consideration of the foregoing cessions, the United States engages to pay to the Ottawa and Chippewa nations, the following sums, namely. 1st. An annuity of thirty thousand dollars per annum, in specie, for twenty years; eighteen thousand dollars, to be paid to the Indians between Grand River and the Cheboigan; three thousand six hundred dollars, to the Indians on the Huron shore, between the Cheboigan and Thunder-bay river; and seven thousand four hundred dollars, to the Chippewas north of the straits, as far as the cession extends; the remaining one thousand dollars, to be invested in stock by the Treasury Department and to remain incapable of being sold, without the consent of the President and Senate, which may, however, be given, after the expiration of twenty-one years. 2nd. Five thousand dollars per annum, for the purpose of education, teachers, school-houses, and books in their own language, to be continued twenty years, and as long thereafter as Congress may appropriate for the object. 3rd. Three thousand dollars for missions, subject to the conditions mentioned in the second clause of this article. 4th. Ten thousand dollars for agricultural implements, cattle, mechanics' tools, and such other objects as the President may deem proper. 5th. Three hundred dollars per annum for vaccine matter, medicines, and the services of physicians, to be continued while the Indians remain on their reservations. 6th. Provisions to the amount of two thousand dollars; six thousand five hundred pounds of tobacco; one hundred barrels of salt, and five hundred fish barrels, annually, for twenty years. 7th. One hundred and fifty thousand dollars, in goods and provisions, on the ratification of this treaty, to

be delivered at Michilimackinac, and also the sum of two hundred thousand dollars, in consideration of changing the permanent reservations in article two and three to reservations for five years only, to be paid whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars shall be annually paid to the said Indians.

ARTICLE FIFTH. The sum of three hundred thousand dollars shall be paid to said Indians to enable them, with the aid and assistance of their agent, to adjust and pay such debts as they justly owe, and the overplus, if any, to apply to such other use as they may think proper.

ARTICLE SIXTH. The said Indians being desirous of making provision for their half-breed relatives, and the President having determined, that individual reservations shall not be granted, it is agreed, that in lieu thereof, the sum of one hundred and fifty thousand dollars shall be set apart as a fund for said half-breeds. No person shall be entitled to any part of said fund, unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty, nor shall any thing be allowed to any such person, who may have received any allowance at any previous Indian treaty. The following principles, shall regulate the distribution. A census shall be taken of all the men, women, and children, coming within this article. As the Indians hold in higher consideration, some of their half-breeds than others, and as there is much difference in their capacity to use and take care of property, and, consequently, in their power to aid their Indian connexions, which furnishes a strong ground for this claim, it is, therefore, agreed, that at the council to be held upon this subject, the commissioner shall call upon the Indian chiefs to designate, if they require it, three classes of these claimants, the first of which, shall receive one-half more than the second, and the second, double the third. Each

man woman and child shall be enumerated, and an equal share, in the respective classes, shall be allowed to each. If the father is living with the family, he shall receive the shares of himself, his wife and children. If the father is dead, or separated from the family, and the mother is living with the family, she shall have her own share, and that of the children. If the father and mother are neither living with the family, or if the children are orphans, their share shall be retained till they are twenty-one years of age; provided, that such portions of it as may be necessary may, under the direction of the President, be from time to time applied for their support. All other persons at the age of twenty-one years, shall receive their shares agreeably to the proper class. Out of the said fund of one hundred and fifty thousand dollars, the sum of five thousand dollars shall be reserved to be applied, under the direction of the President, to the support of such of the poor half-breeds, as may require assistance, to be expended in annual instalments for the term of ten years, commencing with the second years. Such of the half-breeds, as may be judged incapable of making a proper use of the money, allowed them by the commissioner, shall receive the same in instalments, as the President may direct.

ARTICLE SEVENTH. In consideration of the cessions above made, and as a further earnest of the disposition felt to do full justice to the Indians, and to further their well being, the United States engage to keep two additional blacksmith-shops, one of which, shall be located on the reservation north of Grand river, and the other at the *Sault Ste. Marie*. A permanent interpreter will be provided at each of these locations. It is stipulated to renew the present dilapidated shop at Michilimackinac, and to maintain a gunsmith, in addition to the present smith's establishment, and to build a dormitory for the Indians visiting the post, and appoint a person to keep it, and supply it with fire-wood. It is also agreed, to support two farmers and assistants, and two mechanics, as the

President may designate, to teach and aid the Indians, in agriculture, and in the mechanic arts. The farmers and mechanics, and the dormitory, will be continued for ten years, and as long thereafter, as the President may deem this arrangement useful and necessary; but the benefits of the other stipulations of this article, shall be continued beyond the expiration of the annuities, and it is understood that the whole of this article shall stand in force, and inure to the benefit of the Indians, as long after the expiration of the twenty years as Congress may appropriate for the objects.

ARTICLE EIGHTH. It is agreed, that as soon as the said Indians desire it, a deputation shall be sent to the southwest of the Missouri River, there to select a suitable place for the final settlement of said Indians, which country, so selected and of reasonable extent, the United States will forever guaranty and secure to said Indians. Such improvements as add value to the land, hereby ceded, shall be appraised, and the amount paid to the proper Indian. But such payment shall, in no case, be assigned to, or paid to, a white man. If the church on the Cheboigan, should fall within this cession, the value shall be paid to the band owning it. The net proceeds of the sale of the one hundred and sixty acres of land, upon the Grand River upon which the missionary society have erected their buildings, shall be paid to the said society, in lieu of the value of their said improvements. When the Indians wish it, the United States will remove them, at their expence, provide them a year's subsistence in the country to which they go, and furnish the same articles and equipments to each person as are stipulated to be given to the Pottowatomies in the final treaty of cession concluded at Chicago.

ARTICLE NINTH. Whereas the Ottawas and Chippewas, feeling a strong consideration for aid rendered by certain of their half-breeds on Grand river, and other parts of the country ceded, and wishing to testify their gratitude on the present

occasion, have assigned such individuals certain locations of land, and united in a strong appeal for the allowance of the same in this treaty; and whereas no such reservations can be permitted in carrying out the special directions of the President on this subject, it is agreed, that, in addition to the general fund set apart for half-breed claims, in the sixth article, the sum of forty-eight thousand one hundred and forty-eight dollars shall be paid for the extinguishment of this class of claims, to be divided in the following manner: To Rix Robinson, in lieu of a section of land, granted to his Indian family, on the Grand river rapids, (estimated by good judges to be worth half a million,) at the rate of thirty-six dollars an acre: To Leonard Slater, in trust for Chiminonoquat, for a section of land above said rapids, at the rate of ten dollars an acre: To John A. Drew, for a tract of one section and three quarters, to his Indian family, at Cheboigan rapids, at the rate of four dollars; to Edward Biddle, for one section to his Indian family at the fishing grounds, at the rate of three dollars: to John Holiday, for five sections of land to five persons of his Indian family, at the rate of one dollar and twenty-five cents; to Eliza Cook, Sophia Biddle, and Mary Holiday, one section of land each, at two dollars and fifty cents: to Augustin Hamelin junr, being of Indian rescent, two sections, at one dollar and twenty-five cents; to William Lasley, Joseph Daily, Joseph Trotier, Henry A. Levake, for two sections each, for their Indian families, at one dollar and twenty-five cents: To Luther Rice, Joseph Lafrombois, Charles Butterfield, being of Indian descent, and to George Moran, Louis Moran, G. D. Williams, for half-breed children under their care, and to Daniel Marsac, for his Indian child, one section each, at one dollar and twenty-five cents.

ARTICLE TENTH. The sum of thirty thousand dollars shall be paid to the chiefs, on the ratification of this treaty, to be divided agreeably to a schedule hereunto annexed.

ARTICLE ELEVENTH. The Ottawas having consideration for one of their aged chiefs, who is reduced to poverty, and it being known that he was a firm friend of the American Government, in that quarter, during the late war, and suffered much in consequence of his sentiments, it is agreed, that an annuity of one hundred dollars per annum shall be paid to Ningweegon or the Wing, during his natural life, in money or goods, as he may choose. Another of the chiefs of said nation, who attended the treaty of Greenville in 1793, and is now, at a very advanced age, reduced to extreme want, together with his wife, and the Government being apprized that he has pleaded a promise of Gen. Wayne, in his behalf, it is agreed that Chusco of Michilimackinac shall receive an annuity of fifty dollars per annum during his natural life.

ARTICLE TWELFTH. All expenses attending the journeys of the Indians from, and to their homes, and their visit at the seat of Government, together with the expenses of the treaty, including a proper quantity of clothing to be given them, will be paid by the United States.

ARTICLE THIRTEENTH. The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

In testimony whereof, the said Henry R. Schoolcraft, commissioner on the part of the United States, and the chiefs and delegates of the Ottawa and Chippewa nation of Indians, have hereunto set their hands, at Washington the seat of Government, this twenty-eighth day of March, in the year one thousand eight hundred and thirty-six.

TREATY WITH THE OTTAWA AND CHIPPEWA, 1855.

Articles of agreement and convention made and concluded at the city of Detroit, in the State of Michigan, this the thirty-first day of July, one thousand eight hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836.

In view of the existing condition of the Ottowas and Chippewas, and of their legal and equitable claims against the United States, it is agreed between the contracting parties as follows:

ARTICLE 1. The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions, to wit:

First. For the use of the six bands residing at and near Saulte Ste. Marie, sections 13, 14, 23, 24, 25, 26, 27, and 28, in township 47 north, range 5 west; sections 18, 19, and 30, in township 47 north, range 4 west; sections 11, 12, 13, 14, 15, 22, 23, 25, and 26, in township 47 north, range 3 west, and section 29 in township 47 north, range 2 west; sections 2, 3, 4, 11, 14, and 15 in township 47 north, range 2 east, and section 34 in township 48 north, range 2 east; sections 6, 7, 18, 19, 20, 28, 29, and 33 in township 45 north, range 2 east; sections 1, 12, and 13, in township 45 north, range 1 east, and section 4 in township 44 north, range 2 east.

Second. For the use of the bands who wish to reside north of the Straits of Mackinac townships 42 north, ranges 1 and 2 west; township 43 north, range 1 west, and township 44 north, range 12 west.

Third. For the Beaver Island Band—High Island, and Garden Island, in Lake Michigan, being fractional townships 38 and 39 north, range 11 west—40 north, range 10 west, and in part 39 north, range 9 and 10 west.

Fourth. For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 39, inclusive, north, range 5 west—township 34 to 38, inclusive, north, range 6 west—townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River.

Fifth. For the bands who usually assemble for payment at Grand Traverse, townships 29, 30, and 31 north, range 11 west, and townships 29, 30, and 31 north, range 12 west, and the east half of township 29 north, range 9 west.

Sixth. For the Grand River bands, township 12 north, range 15 west, and townships 15, 16, 17 and 18 north, range 16 west.

Seventh. For the Cheboygan band, townships 35 and 36 north, range 3 west.

Eighth. For the Thunder Bay band, section 25 and 36 in township 30 north, range 7 east, and section 22 in township 30 north, range 8 east.

Should either of the bands residing near Sault Ste. Marie determine to locate near the lands owned by the missionary society of the Methodist Episcopal Church at Iroquois Point, in addition to those who now reside there, it is agreed that the United States will purchase as much of said lands for the use of the Indians as the society may be willing to sell at the usual Government price.

The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of orphan children under twenty-one years of age containing two or more persons, 80 acres of land, and to each single orphan child under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described, under the following rules and regulations:

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong—*Provided*, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. Class 1st, shall contain the names of heads of families; class 2d, the names of single persons over twenty-one years of age; class 3d, the names of orphan children under twenty-one years of age, comprising families of two or more persons, and class 4th, the names of single orphan children under twenty-one years of age, and no person shall be entered in more than one class. Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

At any time within five years after the completion of the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the Office of Indian Affairs at Washington City.

All sections of land under this article must be made according to the usual subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale of transfer by the holder of the land described therein.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein, *Provided* That such restriction shall cease only upon the actual issuing of the patent; *And provided further* That the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. *And provided also,* That after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to the heirs of such deceased persons.

The benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan, and entitled to participate in the annuities provided by the treaty of March 28, 1836; but this provision shall not be construed to exclude any Indian now belonging to the Garden River band of Sault Ste. Marie.

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre, as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.

Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.

It is also agreed that any lands within the aforesaid tracts now occupied by actual settlers, or by persons entitled to pre-emption thereon, shall be exempt from the provisions of this article; provided, that such pre-emption claims shall be proved, as prescribed by law, before the 1st day of October next.

Any Indian who may have heretofore purchased land for actual settlement, under the act of Congress known as the Graduation Act, may sell and dispose of the same; and, in such case, no actual occupancy or residence by such Indians on lands so purchased shall be necessary to enable him to secure a title thereto.

In consideration of the benefits derived to the Indians on Grand Traverse Bay by the school and mission established in 1838, and still continued by the Board of Foreign Missions of the Presbyterian Church, it is agreed that the title to three separate pieces of land, being parts of tracts Nos. 3 and 4, of the west fractional half of section 35, township 30 north, range 10 west, on which are the mission and school buildings and improvements, not exceeding in all sixty-three acres, one hundred and twenty-four perches, shall be vested in the said board on payment of $1.25 per acre; and the President of the United States shall issue a patent for the same to such person as the said board shall appoint.

The United States will also pay the further sum of forty thousand dollars, or so much thereof as may be necessary, to be applied in liquidation of the present just indebtedness of the said Ottawa and Chippewa Indians; provided, that all claims presented shall be investigated under the direction of the Secretary of the Interior, who shall prescribe such rules and regulations for conducting such investigation, and for testing the validity and justness of the claims, as he shall deem suitable and proper; and no claim shall be paid except upon the certificate of the said Secretary that, in his opinion, the same is justly and equitably due; and all claimants, who shall not present their claims within such time as may be limited by said Secretary within six months from the ratification of the treaty, or whose claims, having been presented, shall be disallowed by him, shall be forever precluded from collecting the same, or maintaining an action thereon in any court what-

ever; and provided, also, that no portion of the money due said Indians for annuities, as herein provided, shall ever be appropriated to pay their debts under any pretence whatever; provided, that the balance of the amount herein allowed, as a just increase of the amount due for the cessions and relinquishments aforesaid, after satisfaction of the awards of the Secretary of the Interior, shall be paid to the said Chippewas or expended for their benefit, in such manner as the Secretary shall prescribe, in aid of any of the objects specified in the second article of this treaty.

ARTICLE 2. The United States will also pay to the said Indians the sum of five hundred and thirty-eight thousand and four hundred dollars, in manner following, to wit:

First. Eighty thousand dollars for educational purposes to be paid in ten equal annual instalments of eight thousand dollars each, which sum shall be expended under the direction of the President of the United States; and in the expenditure of the same, and the appointment of teachers and management of schools, the Indians shall be consulted, and their views and wishes adopted so far as they may be just and reasonable.

Second. Seventy-five thousand dollars to be paid in five equal annual instalments of fifteen thousand dollars each in agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon.

Third. Forty-two thousand and four hundred dollars for the support of four blacksmith-shops for ten years.

Fourth. The sum of three hundred and six thousand dollars in coin, as follows: ten thousand dollars of the principal, and

the interest on the whole of said last-mentioned sum remaining unpaid at the rate of five percent, annually for ten years, to be distributed *per capita* in the usual manner for paying annuities. And the sum of two hundred and six thousand dollars remaining unpaid at the expiration of ten years, shall be then due and payable, and if the Indians then require the payment of said sum in coin the same shall be distributed *per capita* in the same manner as annuities are paid, and in not less than four equal annual instalments.

Fifth. The sum of thirty-five thousand dollars in ten annual instalments of three thousand and five hundred dollars each, to be paid only to the Grand River Ottawas, which is in lieu of all permanent annuities to which they may be entitled by former treaty stipulations, and which sum shall be distributed in the usual manner *per capita*.

ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820.

ARTICLE 4. The interpreters at Sault Ste. Marie, Mackinac, and for the Grand River Indians, shall be continued, and another provided at Grand Traverse, for the term of five years, and as much longer as the President may deem necessary.

ARTICLE 5. The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the

purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.

ARTICLE 6. This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof the said George W. Manypenny and the said Henry C. Gilbert, commissioners as aforesaid, and the undersigned chiefs and headmen of the Ottawas and Chippewas, have hereto set their hands and seals, at the city of Detroit the day and year first above written.

[471 F Supp 192]

UNITED STATES of America et al., Plaintiffs,

v.

STATE OF MICHIGAN et al., Defendants.

No. M26-73 C.A.

United States District Court,
W. D. Michigan, N. D.

May 7, 1979.

[471 F Supp 200]

OPINION

PREFACE

FOX, Chief Judge.

"No one can deny that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature, or of congress, which is repugnant to it, can be of any validity. Now, if an act of a state legislature be repugnant to the constitution of the state, the state court will declare it void; and if such act be repugnant to the constitution of the Union, or a law made under that constitution, which is declared to be the supreme law of the land, is it not equally void? And under such circumstances, *if this court should shrink from a discharge of their duty, in giving effect to the supreme law of the land, would they not violate their oath, prove traitors to the constitution, and forfeit all just claim to the public confidence?*" *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 571-2, 8 L.Ed. 483 (1832) (McLean, J., concurring) (emphasis supplied).

When matters of great public and constitutional significance involving fundamental duties of the United States come here

for resolution, this court assumes an extra duty of care in explaining the reasons for its decision. As always, the court states the factual basis and legal standards on which

[471 F Supp 201]

its conclusion rests so that the appellate court will know the legal grounds for this court's decision. Equally important, however, th court assumes also an affirmative obligation to attempt to educate the public concerning the basic principles underlying our constitutional democracy and the practical application of these principles in our public affairs. *See, Oliver* v. *Kalamazoo Bd. of Education*, 368 F.Supp. 143 (W.D. Mich. 1973).

NORTHWEST ORDINANCE

THE NORTHWEST TERRITORIAL GOVERNMENT—1787 THE CONFEDERATE CONGRESS, JULY 13, 1787

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged. *The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.* (Emphasis supplied.)

The above language, taken from the Northwest Ordinance, first enacted by the Confederated Congress in 1787 and re-enacted by the First Congress of the United States at its very first session in 1789, is the backdrop for this action. It will be discussed in detail in the course of this opinion.

Also a backdrop of this case is the history of the American treatment of the Indians. In 1869 President Grant appointed a commission [pursuant to Act of Congress of April 10, 1869] composed of "nine men, representing the influence and philanthropy of six leading States, to visit the different Indian reservations, and to 'examine all matters appertaining to Indian affairs.'" Their report includes the following language:

> While it cannot be denied that the government of the United States, in the general terms and temper of its legislation, has evinced a desire to deal generously with the Indians, it must be admitted that the actual treatment they have received has been unjust and iniquitous beyond the power of words to express. Taught by the government that they had rights entitled to respect; when those rights have been assailed by the rapacity of the white man, the arm which should have been raised to protect them has been ever ready to sustain the aggressor. The history of the government connections with the Indians is a shameful record of broken treaties and unfulfilled promises.
>
> The history of the border white man's connection with the Indians is a sickening record of murder, outrage, robbery, and wrongs committed by the former as the rule, and occasional savage outbreaks and unspeakably barbarous deeds of retaliation by the latter as the exception.
>
> The class of hardy men on the frontier who represent the highest type of the energy and enterprise of the American people, and are just and honorable in their

sense of moral obligation and their appreciations of the rights of others, have been powerless to prevent these wrongs, and have been too often the innocent sufferers from the Indians' revenge. That there are many good men on the border is a subject of congratulation, and the files of the Indian Bureau attest that among them are found some of the most earnest remonstrants against the evils we are compelled so strongly to condemn. *The testimony of some of the highest military officers of the United States is*

[471 F Supp 202]

on record to the effect that, in our Indian wars, almost without exception, the first aggressions have been made by the white man, and the assertion is supported by every civilian of reputation who has studied the subject. In addition to the class of robbers and outlaws who find impunity in their nefarious pursuits upon the frontiers, there is a large class of professedly reputable men who use every means in their power to bring on Indian wars, for the sake of the profit to be realized from the presence of troops and the expenditure of government funds in their midst. They proclaim death to the Indians at all times, in words and publications, making no distinction between the innocent and the guilty. They incite the lowest class of men to the perpetration of the darkest deeds against their victims, and, as judges and jurymen, shield them from the justice due to their crimes. Every crime committed by a white man against an Indian is concealed or palliated; every offense committed by one Indian against a white man is borne on the wings of the post or the telegraph to the remotest corner of the land, clothed with all the horrors which the reality or imagination can throw around it. Against such influences as these the people of the United States need to be warned. The

murders, robberies, drunken riots, and outrages perpetrated by Indians in time of peace—taking into consideration the relative population of the races on the frontier—do not amount to a tithe of the number of like crimes committed by white men in the border settlements and towns. Against the inhuman idea that the Indian is only fit to be exterminated, and the influence of the men who propagate it, the military arm of the government cannot be too strongly guarded. It is hardly to be wondered at that inexperienced officers, ambitious for distinction, when surrounded by such influences, have been incited to attack Indian bands without adequate cause, and involve the nation in an unjust war. It should, at least, be understood that in the future such blunders should cost the officer his commission, and that such destruction is an infamy.[1]

---

[1]

Violence against Indians who would exercise their rights is not a ghost in a history book nor a deed which we can ascribe to long dead, anonymous ancestors. The threat of violence today was documented in a recent article by Tom Opre in the Detroit Free Press, which is reproduced in part below:

DETROIT FREE PRESS/SUNDAY, AUG. 27, 1978
PICTURE–TOM OPRE

Confrontations have come close so far. Rock and bottle-throwing incidents, boat sinkings and swampings, torn and stolen gillnets and innumerable heated verbal exchanges along with pushing and shovings are the limit so far in the Charlevoix area. Coast Guard patrols had to protect Indian boats in some incidents. Both sides have armed themselves prior to this in Upper Peninsula incidents earlier, but no shots were fired.

(It's reported reliably, though, that one Indian netter, launching in Round Lake and moving under the channel bridge to Lake Michigan, was very accurately bombed by local white fishermen and their families. The bombs? Bagged up contents from camper porta-potties. Police agencies are now patroling the bridge.)

"We don't want Indian gear destroyed or anyone – on either side – hurt," Washington emphasized. "We don't want any more

Report of Commission of Citizens (November 23, 1869), cited in Report of Commission of Indian Affairs, 47-48 (1869). (Emphasis supplied.)

Senator Clay made similar points on the floor of the Senate in 1835. Speaking of the Cherokee Indians of Georgia, he said, as reported in the *Congressional Globe* for February 4, 1835:

> Mr. C. said he wished to turn the attention of the Senate to the nature of the wrongs this people had suffered—to the present condition of the Cherokees, whose lands had been guarantied by the United
>
> [471 F Supp 203]
>
> States. He went into the examination with the utmost feelings of sorrow and regret at the miserable state to which these tribes were reduced by the laws of the States. But he would assure the honorable Senators from Georgia he was actuated by no hostile intentions to that State. Georgia was the first that made these encroachments; she originated the plan of invading the Indian rights, and she had carried it far beyond all others. He had not all these various laws before him. It was not necessary to go into

---

Wounded Knees on our hands," a reference to South Dakota troubles a few years ago where both Indians and federal officers were killed.

A DNR observer at Charlevoix told me the situation had cooled somewhat in the past week, though.

"Indians seemed to have backed off a bit," he said. "Maybe that's because most of the boat launching sites are closed to them now." Indians operate from small boats launched by hand at the lakeshore. The operations are efficient, though. DNR estimates of the best single day's catch off Norwood was 14,000 pounds, most of it whitefish. Lake trout and salmon are taken regularly, though.

The heinous deeds of our ancestors appear no further from us than our present ability to restrain the "frontiersmen" lost in our more civilized and more self-righteous society.

> details; it was sufficient to notice the results. By the first act Georgia abolished the Government of the Cherokee nation. No nation (said Mr. C.) can exist without a Government of some kind. These people had formed and established a Government in imitation of our own. But it was wholly immaterial what the humble form of that Government might be. Georgia had abolished it. She next proceeded to divide their territories into counties, and distribute them by lotteries among their citizens—every head of a family being entitled to the land drawn against his number. She did indeed reserve a small pittance of a few acres for those Indians who wished to remain within her limits, but under circumstances that rendered them worthless. She gave them no rights, no franchise, no single privilege. They were denied the power of testifying in courts of justice. No Indian could be a witness in favor of his fellows.

The present case is not a 14th Amendment case, as defendants advocate. It is an Indian treaty case in which the State asks the court to abrogate the Indians' aboriginal rights which have survived for over 12,000 years and are valid to this day, and which were guaranteed to the Indians by the Treaty of Ghent and the Treaties of 1836 and 1855. This case deals only with the jurisdiction of the Federal government over the Indians and its authority to enter into treaties which bind the states. Const. Art. 6, cl. 2; Art. I, § 8.

Michigan would take the Indians' subsistence and livelihood, their right to fish, and divide it by a modern-day lottery, the Indians being permitted to compete for licenses equally with those who have taken their rights from them.

I.

INTRODUCTION

On April 9, 1973, the United States of America in its own behalf and in behalf of the Bay Mills Indian Community, initiated this litigation in order to protect the tribe's rights to fish in certain waters of the Great Lakes vested in the tribe by virtue of aboriginal occupation and use, the Treaty of Ghent of 1814, and the Treaty with the Ottawa and Chippewa Nation of 1836. In its complaint, the United States asked that the State be enjoined from interfering with the Indians' treaty-confirmed rights to fish in the Great Lakes.

The Bay Mills Indian Community intervened in the action on December 12, 1974, and added certain individual officials of the Michigan Department of Natural Resources as defendants in its complaint. Bay Mills also expanded the scope of the complaint by alleging that it possessed a reserved exclusive fishing right in Whitefish Bay of Lake Superior and a right to fish in the remaining waters of Lake Superior free of state regulation. Accordingly, Bay Mills asked the court for declaratory and injunctive relief to prohibit the State from interfering with these fishing rights, and an affirmative order that the State must exercise its police power to regulate any non-Indian fishing which would be in derogation of these rights. Bay Mills amended its complaint on October 28, 1975, added the Michigan Department of Natural Resources as a defendant, and again expanded the scope of the complaint by alleging a treaty-protected, reserved right to fish in all of the area of the Great Lakes ceded to the United

[471 F Supp 204]

States in a treaty signed in 1836. This ceded area covered large portions of Lakes Michigan, Superior, and Huron.

The Sault Ste. Marie tribe of Chippewa Indians, a tribe organized in 1975 under the Indian Reorganization Act, 25 U.S.C. § 476, intervened in this action and filed a complaint against the above-named defendants on December 12, 1975. In its complaint, the tribe alleged a treaty-protected, reserved right to fish in Lake Superior free from state regulation. On June 17, 1976, the Chippewa tribe filed an amended complaint in which it alleged an exclusive right to fish in the waters reserved to the Indians in the Treaty of 1836, and a right to fish in the ceded waters of the Great Lakes free from state regulation.

The United States amended its complaint in June of 1976 to comply with the intervenors' complaints, with minor differences. The United States did not allege that there existed "ceded waters" under the 1836 treaty, but instead alleged that the Indians had an aboriginal right to fish in the waters adjacent to the lands ceded under the 1836 treaty and adjacent to the lands reserved in that treaty. Also, the United States did not ask for a declaratory judgment that the tribes have exclusive fishing rights in all the waters adjacent to land reservations contained in the 1836 treaty, but instead asked the court to determine that the State had no jurisdiction to regulate anyone fishing within the Bay Mills Indian Community reservation, which it alleges included Whitefish Bay. In effect, the United States' complaint excluded the Chippewa tribe's allegation that it has exclusive fishing rights in certain waters of the Great Lakes adjacent to 1836 treaty reservation areas in addition to Whitefish Bay.

The plaintiffs' pleas for relief are grounded in the Supremacy Clause of the United States Constitution, Article 6, Clause 2.

The State of Michigan, in its answer, disputed the interpretation given the Treaty of 1836 by the plaintiffs, questioned the continued existence of the tribes which were signatories

to the Treaty, and alleged as defenses: (1) that the treaty was a removal treaty, and therefore the Indians intended to relinquish any aboriginal fishing rights they may have held in 1836; (2) a subsequent treaty in 1855 discharged all prior rights under the 1836 treaty; (3) this 1855 treaty was an accord and satisfaction extinguishing all prior rights; (4) the Indians did not have any aboriginal rights over the Great Lakes; (5) Article 13th of the 1836 Treaty—which granted the Indians the right to use the fruits of the land until the land is required for settlement—acted as a reservation upon a condition subsequent, and that condition having occurred, the use is extinguished; (6) the land reservations made in the 1836 Treaty have expired by the terms of the Treaty; (7) even though there may be a treaty-protected right to fish, the State of Michigan may still regulate this right in the interest of conservation or under other state police powers; (8) the expansion of the Sault Ste. Marie Chippewa reservation may be done only with the consent of the state; (9) the Chippewa Tribe was dissolved by the 1855 Treaty, and the Chippewa tribe from Sault Ste. Marie is not in privity with the original signatories to the treaty.

The State of Michigan set forth a counterclaim in its answer in which it asked the court to declare that the Indians involved in this action are not exempt from state regulation. The Court views this counterclaim as a repetition of the denials and defenses set forth above, however.

The Michigan United Conservation Clubs (MUCC), a sportsman's group, petitioned this court for permission to intervene in the action. That petition was denied for reasons set forth in an earlier opinion of this court; MUCC has been permitted to act as an amicus curiae, however.

After numerous pretrial motions were disposed of, trial began on February 27, 1978. The Court heard extensive historical

evidence and received voluminous documentation meant to provide a basis for interpreting the often ambiguous treaties in issue in this case. Extensive briefs and arguments considered the issue of whether the State of Michigan or the United States

[471 F Supp 205]

alone has the right to regulate fishing by the plaintiff tribes in the Upper Great Lakes.

Before the filing of the complaint and continuously during the course of these proceedings, the State of Michigan and certain individually named state officials have acted in derogation of the vested aboriginal and federal rights of the plaintiff Indian tribes. The conflict between the state and tribal fisherman is notorious; scarcely a day goes by without an article appearing in one or more of the state's major newspapers concerning the controversy. That it is a passionate issue is exemplified by a recent wholly improper attempt to influence this Court through the circulation of petitions amongst sports fishermen which urged that the court rule against the Indians. The circulation of petitions is an action diametrically at odds with the methods of access to the courts mandated by the Federal Rules of Civil Procedure. This misguided action gave thousands of people the erroneous impression that constitutional rights are a matter of popular contest. This was a corruption of the concept of the Federal Judicial system. In a democracy, many times people violate Constitutional and Inalienable rights. The United States Courts exist to ensure guaranteed constitutional rights against the TYRANNY OF POPULAR MAJORITIES. Federal Court Judges are, or ought to be, custodians of secured constitutional right.

Before giving my specific findings of fact and conclusions of law, and in the effort to foster public understanding, I

present the following more exhaustive statement of the issues and law involved in this case.

The United States, guided by the Nixon administration and acting in its role as trustee for the Indians, filed this action against the State of Michigan to secure Indian rights which it says were reaffirmed by an 1836 Treaty with the Ottawa and Chippewa Indians. In so doing it was merely accepting obligations imposed by the Northwest Ordinance, *supra*. The Northwest Ordinance not only provided for Michigan's first government but simultaneously set the standard by which the territorial government and the United States would be obliged to deal with the Indians of the Territory.

By this enactment, the Founding Fathers declared a guardian-ward relationship between the United States and the Michigan Indians. Trained as they were in denominational schools, where their routine assignments included translation of the bible from English to Latin and from Latin to Greek, the Founding Fathers did not hesitate to found this relationship on moral and religious principles, the principles which, generally,they transformed into political principles when they formulated our present government, including them in the Declaration of Independence and the Preamble to the Constitution as well as here in the Northwest Ordinance. It is these principles which must be applied here in interpreting the treaties and in measuring the transactions between the United States and its wards, the Indians. To do otherwise would be in violation not only of the laws of man but also of the laws of "nature and nature's God," which are, or ought to be the Supreme Law of this land.

Also, before Michigan's statehood, the United States entered into a treaty with Great Britain in which it offered its most solemn word as a nation, in formal treaty, to honor all rights of the Michigan Indians.

ARTICLE THE NINTH

The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all tribes of nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: *Provided always*, That such tribes or nations shall agree to desist from all hostilities, against the United States of America, their citizens and sub-

[471 F Supp 206]

jects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly. And his Britannic majesty engages, on his part, to put an end immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom he may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to, in one thousand eight hundred and eleven, previous to such hostilities: *Provided always*, That such tribes or nations shall agree to desist from all hostilities against his Britannic majesty, and his subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly.

This provision of the Treaty of Ghent, signed on December 24, 1814 (8 Stat. 218), was not mere rhetoric; it was a compromise position secured from Britain, which threatened indefinite continuation of the War of 1812 unless the United

States restored the rights of Britain's Indian allies. Both nations pledged to restore to such tribes or nations all the possessions, rights and privileges which they may have enjoyed or been entitled to in 1811, before such hostilities. Both nations assumed the guardianship of the Indians and acknowledged all aboriginal Indian rights to use land, sea and air in the New World, excluding all whites from their territory until and unless the United States had secured the lands from the Indians by valid, just, humane treaties. As guardian, the United States was obliged to acquire the lands and other property not on the best terms it could get for itself, but on the best terms it could get for the Indians. At all times it was required to protect the Indians' interests. In the Treaty of Ghen, Britain effected its duty as guardian of the Indians of the lands it surrendered to the United States by securing a promise from the United States to assume a guardian relationship toward those Indians. The United States agreed to treat these Indians not as a defeated enemy, but as a ward fully possessed of all rights arising by virtue of original occupancy and use of the lands. The United States accepted this obligation in exchange for an identical promise by Great Britain and in order to end the War of 1812. Indians of the Northwest Territory who had allied with Great Britain were possessed of aboriginal rights, vested by virtue of original occupancy and use and International treaty and protected by the obligations of their guardian, the United States.

In our constitutional system of government the states cannot enter into treaties with foreign governments—only the federal government can. When acting within its power to deal with foreign governments, the federal government can make treaties which give it authority in areas which otherwise would belong solely to the states. In such cases the state no longer has authority in areas governed by the treaty. Federal control of migratory waterfowl, for instance, derives from a treaty with Great Britain. In this case the federal government has entered

into a treaty with Indians, a matter which, like foreign affairs, is within its sole jurisdiction. One question presented here is whether this treaty with the Indians deprives the state of all authority to regulate matters covered by the treaty, specifically Indian fishing in certain waters of the Great Lakes.

From the earliest times the United States has been ambivalent about its assumed role as trustee for the Indians, expressing noble sentiments executed by ignoble actions. During the 18th and 19th centuries the United States typically dealt with the Indians by treaty, as co-sovereign nations. Typically also, the United States secured Indian lands on terms which were little short of conquest and carried out the treaty in such fashion as to complete the vanquishment.

Michigan has staked most of its case on an 1830 Act of Congress called "An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi," (4 Stat. 411) and referred to as the "Removal Act." Congress

[471 F Supp 207]

did nothing in this Act to lessen the obligation of the Executive toward the Indians.[2] The prinicipal authorization of the Act is to make it lawful for the President to offer lands belonging to the United States west of the Mississippi to the Indians who chose to exchange their present lands. Section 7 of the Act indicates that the Act does not contemplate any variation in Indian policy: "*Provided*, That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes."

---

[2]

American Heritage Pictorial History of the Presidents, Vol. 1. P. 224 (1968).

Of necessity, this court has had an opportunity to review the actions of almost every administration in the history of our country. The removal policy in question began during the Presidency of Thomas Jefferson. Piecemeal removal began during Monroe's administration but slowed down during the administration of John Quincy Adams, who had a humane and paternal attitude toward the Indians. Andrew Jackson ran for office supporting the policy and received authorization from Congress to implement it. During Jackson's term Henry Schoolcraft was appointed to secure from the Indian bands, whose progeny make up the plaintiff tribes, lands which would become the State of Michigan. During Van Buren's presidency, pressure for removal of Indians to lands west of the Mississippi waned. The Indians stayed in Michigan, but were deprived of their rights under the 1836 treaty, and many others, almost as quickly as they were signed. By the time Pierce became President, even many of the eastern states wanted to keep Indians on their ancestoral homes. A new treaty was signed with the Michigan Indians during this administration which gave the Indians permanent reservations (most of which no longer exist) in exchange for releasing the United States from its unfulfilled financial and personal property obligations under earlier treaties.

In an effort to provide a perspective on the Removal Policy of the United States, I quote the following accounts of noted historians who the State's own expert testified are authoritative and reliable. (Tr. 1716.)

3. Removal of the Eastern Indians

An American journalist who had spent several years in India, and whose small children had come to love the Indians, came home in 1958. Shortly thereafter he found the boys crying as they watched a TV "Western" because, as one moaned, "They're killing *Indians!*" Papa had to explain that these were

not Indians of India but Red Indians, and that to kill them was part of the American Way of Life.

The only extenuation of American policy toward the natives of North America is that it continued an old-world process of one race or people pushing a weaker one out of an area that it wanted. Almost every European today is a descendant of Asiatic intruders into Europe; almost every North African the descendant of Arab intruders. "The country is a land for cattle," said the children of Reuben to Moses when they saw the land of Gilead, "and thy servants have cattle; wherefore, said they, if we have found grace in thy sight, let this land be given unto thy servants for a possession." In the United States as elsewhere in the nineteenth century, this process of conquest and expansion took the form of a relatively highly developed civilization pushing out a backward people who could not or would not be absorbed, and who were too few in number and weak in technique long to resist. But some of the Indians put up a very good fight.

The problem of United States-Indian relations, which for many years had involved international rivalries, became localized after the Florida treaty was ratified in 1821. "Foreign interference" could no longer be used as an excuse for abusing the Indians. And there was no more need to placate them to prevent their siding with the British, French, or Spanish.

Efforts to maintain Indian reservations within the Eastern states was generally unsuccessful, although a few small one, such as that at the Abnaki in Oldtown,

[471 F Supp 208]

Maine, and the Tuscarora reservation near Niagara Falls, still endure, menaced or sliced away by the bulldozer. Conditions for a reservation's lasting were a partial adoption by Indians

of the American Way of Life, and a strong government service to protect them from the white man's trickery and alcohol. But, for fifty years after American independence, the Indians did not wish to conform, many federal agents were political hacks, trading posts were unable to compete with unauthorized private traders who supplied the Indians with liquor, and frontiersmen everywhere coveted the Indians' land.

Monroe's administration bowed to demands of the West by adopting a removal policy. Plans for concentrating the tribes west of the Mississippi now began to take shape, and piecemeal removal began in the 1820's from the Old Northwest and the lower South, to segments of what had been the domains of the Caddo, the Quapaw, and the Osage. Tribesmen with well-developed farms, especially influential halfbreeds, were given the choice of removal, or staying put and becoming American citizens. Those who preferred to leave, exchanged their property for new lands in the West and were promised payment for travel expenses and the value of improvements on their relinquished property. The assent of the Indians was often merely nominal; federal commissioners bribed important chiefs, and, if necessary, got them drunk enough to sign anything. "Persuasion" often took the form of urging the Indians to sell improvements for cash with which to pay off debts to white traders. This removal policy slowed down during the administration of John Quincy Adams, whose attitude toward the Indians was humane and paternal, but picked up momentum and was carried to a successful conclusion (from the white point of view) under Jackson. The President, having negotiated several removal treaties during his military career, knew very well the hardships involved, but regarded this as the only possible way to save the Indians from extinction. They were faced with the irresistible force of a white expansion which the Democrats had no intention of checking.

Soon after Jackson's inauguration, Georgia, Alabama, and Mississippi asserted jurisdiction over Indian reservations, in contemptuous disregard of federal treaties, and even set up county governments to be put in operation as soon as the rightful owners of the soil were expelled. Congress then passed an Indian Removal Act (1830), appropriating half a million dollars for this purpose. The President was authorized to grant lands in the unorganized part of the Louisiana Purchase in exchange for those relinquished in the East, to protect the Indians in their new reservations, to pay expenses of removal and one year's subsistence, and compensate them for improvements on the relinquished land.

The liquidation of Indian reservations in the Old Northwest was largely accomplished between 1829 and 1843. Mixed bands of Shawnee, Delaware, Wyandot, and other were persuaded to accept new reservations west of Missouri. Their numbers were drastically reduced by disease on the journey. Theft by federal officials of what was due to the Indians, and funeral rites for those who died en route, exhausted their resources long before this "trial of tears," as it was aptly called by later writers sympathetic to the Indians, came to an end. Many groups were unable to make the journey in one season and suffered intensely at improvised winter quarters. A cholera epidemic broke out in 1832; measles took hundreds of lives. Further trials awaited the survivors, especially those who hoped to till the soil; the cost of equipment reduced them to penury or debt long before they could raise a crop or draw upon tribal annuities. Money from the sale of improvements at the old village ordinarily went into the expenses of travel, if it did not stick in the pockets of federal agents.

At one point during these removals, hostilities broke out. Black Hawk, chief of the Sauk and Fox, who had fought on the British side in 1812, tried to retain his ancient tribal seat at the mouth of Rock river, Illinois, opposite Davenport, Iowa.

White squatters encroached on the village and enclosed the Indians' cornfields. After the

[471 F Supp 209]

governor of Illinois had threatened him, Black Hawk agreed that after crossing the Mississippi for his annual winter hunt, he would never return. But his people, threatened by hostile Sioux, ran out of food. Hoping to find a vacant prairie in which to plant a corn crop, Black Hawk recrossed the Mississippi in the spring of 1932 with about 1000 members of his tribe. The governor of Illinois, assuming this to be a hostile expedition, called out the militia (Abraham Lincoln commanding a company) and pursued the starving Indians up the Rock river into the Wisconsin wilderness. It was a disgraceful frontier frolic, stained by wanton massacre of Indians, including women and children. The only redeeming feature was the chivalrous consideration of Black Hawk by Lieutenant Jefferson Davis of the regular army, when the captured chief was placed in his charge; forty years later, Davis referred to Black Hawk's rearguard action at Wisconsin Heights as the most gallant fight he had ever witnessed. Black Hawk subsequently visited the "Great White Father" in Washington and was presented with a sword and a medal by President Jackson. But he lost his tribal lands.

The four great Indian nations of the Old Southwest, the Chickasaw, Creek, Choctaw, and Cherokee, were Jackson's particular problem. In 1830 the Choctaw of Mississippi signed a treaty providing for their removal within three years. As with others, this migration brought death, suffering, and poverty. In 1832 a treaty was signed with the Creek nation to wind up their large reservation in Alabama. Some members kept individual allotments and faced the cunning of new white neighbors who poured into their reservation before they could leave. Many died on the journey. By 1860 the Creek nation

had lost about 40 per cent of its population. The rest settled in the Indian Territory, near the Choctaw. The Chickasaw of Mississippi, a fairly small group, fared better and obtained fairly good prices for their improvements, since their land was desirable for cotton plantations.

These three nations were agricultural and sedentary; some even held Negro slaves. The Cherokee, whose nation spread over northwest Georgia into Alabama and around Chickamauga, Tennessee, were even more advanced, by European standards. It had always been a white grievance against the Indians that they rejected "civilization." The Cherokee, unfortunately for themselves, took the palefaces at their word. George Gist, a halfbreed whose Indian name was anglicized as Sequoyah, provided the necessary spark. Convinced that literacy was the key to Indian survival, Sequoyah invented a simple form of writing and printing the Cherokee language; Bibles, other books and even a weekly newspaper *The Cherokee Phoenix* were printed. These Indians welcomed Christian missionaries, built roads, houses, and churches, adopted a constitution for the Cherokee nation and elected a legislature. They became more civilized than the Georgia "crackers" and "hill-billies" who coveted their lands. Nor, for that matter, do the inhabitants of Faulkner's Yoknapatawoha County appear to be an improvement over the Chickasaw whom they replaced.

The independence of the Cherokee nation had been guaranteed by the United States in a treaty of 1791, but the State of Georgia had been chopping away at their lands for over thirty years, and regarded the treaty as obsolete. Discovery of gold in the Cherokee country in 1828 brought this controversy to a head, and a rough class of whites to the spot. Here was a case of federal supremacy against the state rights, as clear at that of South Carolina; but President Jackson let Georgia have her own way. His secretary of war, Peggy Eaton's husband,

informed the Cherokee that they were mere tenants at will. The federal troops sent by President Adams to protect the Indians were withdrawn, and Major Ethan Allen Hitchcock, sent by the war department to investigate frauds against them, made so devastating a report that the department suppressed it. Chief Justice Marshall decided, in a test case brought by a missionary (the Reverend Samuel C. Worcester of Vermont), that the laws of Georgia rightly had

[471 F Supp 210]

no force within Cherokee territory. Jackson commented, "John Marshall has made his decision. Now let him enforce it."

As Georgia held a lottery to dispose of their lands, and no friends in power appeared to help them, the Cherokee were forced to accept removal. Agents of the Indian administration negotiated a treaty with a small minority of the chiefs in 1835, but most of them refused to attend the negotiations, and few departed within the three-year limit set by the treaty. A protest to President Van Buren, signed by 15,665 Indians, was blandly ignored. So, in 1838, regular troops under General Winfield Scott rounded up the Cherokee and started them on the long trial to Indian Territory. This journey cost them one-quarter of their number, but the remainder reorganized their national government, prospered, and have retained their language and alphabet to the present day. Several hundred die-hards in the Great Smokies, who resisted removal, were eventually given the Qualla reservation in North Carolina.

A similar controversy with the Seminole of Florida ended in war. A tricky treaty of removal, negotiated in 1832 with a few chiefs, was repudiated by the greater portion of the tribe, led by a brave chieftain named Osceola. Secure in the fastnesses of the Everglades, Osceola baffled the United States Army for years, and was only captured by treachery at a truce

conference. Many seminoles were rounded up and sent west, but others kept up the fight until 1842. By that time they had cost the United States some $20 million and 1500 lives. A few thousand remained in the Everglades. Their descendants, known as the Miccosukee Seminoles, are the only occupants of some 200,000 acres of swampland north of the Tamiami trail. They live, like their ancestors, by hunting, fishing, and a little agriculture. Never having made peace with the United States, they are currently threatened by drainage and development projects, and a "progress" which they do not want.

The only Western statesman to denounce these shabby and dishonorable proceedings was Henry Clay. His speech in the Senate on 14 February 1835 is the more praiseworthy because the Indians had no votes, and because his Kentucky constituents cared nothing for them. He quoted the long list of treaties guaranteeing to the Cherokee their lands, and the still longer list of acts of the State of Georgia which violated not only these treaties, but the most elementary principles of justice and decency. He drew tears from the eyes of the senators, but they did nothing for the Cherokee except to expedite their removal.

President Jackson seems to have kept a good conscience about all this, and several friends of the Indians, such as Lewis Cass and Thomas L. McKenny, head of the war department's bureau of Indian affairs, supported removal as the only alternative to extermination. Jackson's rationale of Indian removal appears in his Farewell Address of March 1837: "The states which had so long been retarded in their improvement by the Indian tribes residing in the midst of them are at length relieved from the evil, and thus unhappy race—the original dwellers in our land—are now placed in a situation where we may well hope that they will share in the blessings of civilization." Lewis Cass went the General one better, piously invoking the theory that God intended the earth to be cultivated. Cherokee cultivation evidently did not count.

By the end of Van Buren's presidential term, it was assumed, at least by the Democrats, that the Indian question had been solved. All important Eastern tribes—those who, in Jackson's phrase, had "retarded improvement" (i.e. resisted white land grabbers)—had been provided for behind a barrier that ran from Lake Superior through Wisconsin and Iowa Territories, thence along the western boundaries of Missouri and Arkansas to the Red river on the Texas border. Behind this line the tribes were guaranteed possession "as long as grass grows and water runs"; and thence most of them were eventually ousted, when the tide of white settlement lapped around them and slaughtered their game. But, in a sense, the removal policy

[471 F Supp 211]

was justified by the later history of the "five civilized Indian Nations"—Creek Cherokee, Choctaw, Chickasaw, and Seminole—in Oklahoma. Removal gave them the necessary respite to recover their morale, and until the Civil War they succeeded in keeping white men out.

Looking backward, it is now evident that, in view of the irresistible push of the westward movement, Indian removal was the lesser evil. It had to be, but, the process was carried out with unnecessary hardship to the victims.

In many instances missionaries and other individuals managed to protect the Indians. The Ojibway or Chippewa had a reservation along the Bad river of Wisconsin, which was taken under the protection of the Reverend L. H. Wheeler, a Protestant missionary at La Pointe. When, in 1850, white pioneers began lobbying Congress to remove these Indians west of the Mississippi and acquire their lands, Wheeler visited the proposed site of the resettlement and reported that it would be a deed of mercy to shoot every Ojibway rather than send them there. Congress reconsidered, and in 1854 guaran-

teed these Indians three small reservations on the south shore of Lake Superior, which they still hold in 1964. Other tribes were not so fortunate. Between 1853 and 1856 the United States negotiated no fewer than fifty-two treaties, mostly with nations in the Mississippi valley or west of the great river, by virtue of which it added 174 million more acres to the public domain.

Remnants of the Six Nations who had been guaranteed possession or reservations in New York State, by treaties concluded as far back as 1784, have been fighting a losing battle. Chief Red Jacket of the Seneca long managed to preserve the integrity of his people in their reservation, which is now covered by the City of Buffalo. After his death in 1830, a group of New York speculators known as the Ogden Land Company began an intensive drive to get possession of the Seneca reservation. By bribing greedy individuals to act as "chiefs" and sign away land, this company managed to rob the tribe of almost their entire heritage. President Van Buren, to his credit, denounced the subsequent "treaty" as a steal, but it passed the Senate, by the casting vote of Vice President Johnson, the reputed slayer of Tecumseh.

Samuel Eliot Morison, *The Oxford History of The American People* (1965) at 445-52.

Similarly, the *American Heritage Pictorial History of the Presidents* (1968), Vol. 1, states:

TRAIL OF TEARS

> Although the Indian Removal Act of 1930 simply authorized the President to negotiate for land, Andrew Jackson's "requests" were in fact orders. Resigned to their fate, the Choctak and Chickasaw began the long journey from the Southeast to Arkansas and Oklahoma. But the Creek, who had disastrously encountered Jackson in 1813 and

1817, knew better than to believe his promise of guaranteed territory west of the Mississippi. Standing their ground in 1832, they extracted a treaty that said "they shall be free to go or stay, as they please." Four years later, their chiefs in chains and guns at their backs, the Creek joined the exodus. In 1832, the Sauk were driven from their Illinois villages and across the Mississippi, leaving possessions and food stores behind. When Chief Black Hawk sent his braves to negotiate with the military, their white flags were ignored. After several skirmishes, the desperate leader tried to lead his starving people back home, but they were stopped at the river. That pathetic series of events, known as the Black Hawk War, cost hundreds of Indian lives. In Georgia, the peaceful Cherokee sought and won from the Supreme Court a favorable decision, to which neither the state officials nor President Jackson paid any attention. Like the other Indian tribes, the Cherokee embarked on a long journey to the West, along a "trail of tears."

During the 20th century these Indians attempted to secure rights previously denied them. During Theodore Roosevelt's

[471 F Supp 212]

presidency, Congress passed a law which permitted them to appear before the Court of Claims to settle the ownership of monies held in trust by the United States at the time of the 1855 Treaty. The Ottawas and Chippewas filed suit, and, in 1907, were able to show that the United States still owed them monies which were to have been paid twenty years after the signing of the original treaty. *Ottawa and Chippewa Indians v. United States*, 42 Ct. Cl. 240 (1907). In 1946, during the Truman administration, Congress established the Indian Claims Commission. The Bay Mills Indians filed suit and proved that their land had been worth approximately seven

times what they were paid in the 1836 treaty. *Bay Mills Indians* v. *United States*, 26 I.C.C. 538 (1971), Indian Claims Commission Docket # 18E and 58.

The present action marks the first time during the long history of these Indian peoples that the United States has not been the opposing party in their effort to secure rights granted to them by solemn treaties. The action was initiated by the United States during the Nixon administration, was pressed during the Ford administration, and carried forward during the Carter administration. As the case presently stands, the United States and the plaintiff Indian tribes, the parties to the two treaties here in question, have come to this court agreeing that their treaties reserved Indian fishing rights in the Upper Great Lakes.

That there are persons within the state whose rights to fish derive from federal (as opposed to state) law has been totally unacceptable to the state and its Department of Natural Resources. The state's position on this fundamental concept was stated by its counsel in his opening argument:

> There is no question but that the State now and always has stood ready to provide fishing privileges to all our citizens, commercial fishing privileges to all our citizens on an equal basis, including Indians or others of whatever race or ethnic background.

(Tr. 1210) The state obdurately adheres to this position despite the fact that the Supreme Court of the United States long ago rejected the identical contention. In *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Supreme Court reviewed a lower court decision which held, in effect, that the Indians were to be treated just like any other citizen of the State of Washington, notwithstanding their treaty reserved the right to fish at their usual and accustomed sites.

The Court first stated the lower court's ruling and then articulated unambiguously its disapproval:

> In other words, it was decided [by the lower court] that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more.

Id. at 380, 25 S.Ct. at 644. *See also Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919).

Although the United States before 1836 exercised dominion over the area which was later to become the State of Michigan, it had not as of that time taken steps to extinguish aboriginal title in the Ottawas and Chippewas. The southern portion of the Michigan territory was becoming settled in the early 1800's and there could be no assurance of cloudless title in non-Indian settlers so long as the Indians' aboriginal title to the land remained unextinguished. While the United States had several options available to it in order to accomplish an extinction of Indian title, it chose the most common method of that time and negotiated a treaty of cession with the Ottawa and Chippewa living in the northwestern portion of the lower peninsula and eastern half of the Upper Peninsula of what is now the State of Michigan.

Central to the plaintiffs' contentions and rooted in *United States v. Winans, supra,* is the concept that under the treaty the Indians were the grantors of a significant land cession and the United

[471 F Supp 213]

States was the grantee. As in any land transaction (not just those involving the Indians), the grant extends only to those interests and rights specifically conveyed and to none others. When the Indians granted to the United States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 treaty, they retained all those rights not specifically conveyed. Among the retained rights was their aboriginal right to continue to fish in the ceded waters of the Great Lakes.

A misunderstanding quickly arises if the transaction between the United States and the Indians is thought of as the ordinary land transaction were the seller conveys all of his rights in the property he sells. Under this interpretation, it would be necessary for the Indians to be able to show that the United States granted them the right to fish. The transaction is better understood if the focus is upon the concept of "reservation." The Indians gave up some rights, reserving all those not specifically conveyed. In a Washington treaty, for instance, the Indians explicitly reserved a right to fish at "all usual and accustomed places." They then conveyed their land, without conveying to the United States the right to exclude the Indians from the land adjoining the places where they fished. The owners who purchased the land adjoining these fishing places did not have the right to exclude Indians from the land because the Indians implicitly reserved a right to cross it, there being no other way to exercise their fishing right. The white owners only had the right to exclude non-Indian trespassers. Likewise, certain Western Indian tribes explicitly reserved land for agricultural purposes, the treaty not specifically conveying all the water of adjacent rivers to the United States. The tribes reserved whatever water they needed to make use of their land. White settlers with similarly arid lands were not provided for by the treaties, and were not entitled

to any water used by the Indians. The reservation was implied from the fact that the Indians could not otherwise use their lands for agriculture. The Michigan Indians here claim that they never granted their right to fish to the United States, but reserved it so that they could continue to exercise their way of life while living in Michigan, a right they reserved under the treaty. They are not obliged to show that the United States granted *them* the right to fish, but only that they reserved it. They need not show that they explicitly reserved it.

Of course, not every treaty of cession leaves the Indian grantors with reserved fishing rights. In order for the right to exist in the first instance, it must be shown that the Indians were in fact using the resource, i.e., that they exercised this right, subsumed within their larger, aboriginal right to their land and water. Thus, the factual predicate for the reserved fishing right is the documented historic, ethno-historic, anthropologic and archaeologic evidence proving that commercial and subsistence fishing was of significance to the Indians during treaty times. Plaintiffs' testimony at trial overwhelmingly established this factual predicate. Having established these facts, the reserved right to fish arises by implication. Thus, the Indians impliedly reserved the right to subsistence and commercial fishing because of this resource's importance to the Indian community at and before the time they entered into the treaty.

In addition to the implied right to fish, plaintiffs also rely on explicit language in the treaty in support of their claims. Article XIII provides that:

> The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

7 Stat. 495. This language constitutes an explicit reservation of a right broad enough to include the taking of fish from the Great Lakes for subsistence and commercial purposes.

Because the language of the treaties is general, vague and ambiguous, the issues before this court involve not only the treaties themselves but also the history of their negotiation and the entire history of the

[471 F Supp 214]

Michigan Indians. This is the way the case has been tried by the parties. The plaintiffs submitted evidence that, in this northern region of the present United States, where agriculture has always been difficult but fish have been in abundance, Indians have relied upon fishing as basic to their livelihood since 10,000 years before Christ. They submitted evidence that the Indians adopted gill nets from their eastern cousins shortly after the birth of Christ, and used them productively for centuries, even though, as defendants said, white men could not get a catch from such nets unless made of much finer materials. The plaintiffs presented experts who testified that the Michigan Indians grew to depend upon the fisheries to secure European goods and that their earliest participation in the European market economy rested upon their expertise at fishing. It is this sort of evidence which this court had to evaluate in order to determine whether the Ottawas and Chippewas so depended upon subsistence and commercial fishing at the time they signed the treaty of 1836 that they could not have knowingly signed away their right to fish.

The lands ceded by the treaty of 1836 were less explored than many regions of the far west. More desirable lands in Michigan had been secured by prior treaties.[3] The

---

[3]

The Treaty of Saginaw of 1819, 7 Stat. 203 (1819), secured the area around the thumb of the lower peninsula. The negotiation of that treaty is not only typical of treaty negotiations, but also reveals how General Lewis Cass, Secretary of War in 1836, dealt with the Indians in 1819, when he was a commissioner. When General Cass was leaving for the negotiations in which he planned to "procure a cession of that valuable territory," he realized he had a very difficult assignment because the Indians had not received the annuity they had been promised in an 1807 Treaty. Treaty of Nov. 17, 1807 (7 Stat. 105.) Accordingly, he secured a personal bank loan for the amount of the "annuity" (which was in fact a grant) so that he might have silver to place before the Indians during the negotiation. As Cass put it, he got the money so that he would "be able to comply with past engagements before I call upon the Indians to perform others." F. Dustin, The Saginaw Treaty of 1819, 8 (1919). He displayed the silver during the negotiations and gave it to the Indians only after they signed the new treaty. Thus, the consideration from the first treaty served to secure not only the first treaty, but the second also.

Although Cass had made extensive preparations to ensure that the Indians would be there when he arrived, few Indians had come. He sent out runners to gather missing chiefs and tribal leaders, but did not wait for them to arrive. He began negotiations at once. S. Gross, *Indians, Jack and Pines*, 1962. at p. 17. Cass' actions were an aggressive pursuit of his objective of acquiring "that valuable land." The Indians were primitive and uncivilized, but they knew what they wanted, and they did not want to move out of Michigan beyond the Mississippi. They wanted to stay on their hunting grounds.

The Chief, O-Ge-maw-ke-to, addressed Cass' proposal of cession as follows:

> " 'You do not know our wishes. Our people wonder what has brought you so far from your homes. Your young men have invited us to come and light the council fire. We are here to smoke the pipe of peace, but not to sell our lands. Our American Father wants them. Our English Father treats us better. He has never asked for them. Your people trespass upon our hunting grounds. You flock to our shores. Our waters grow warm; our land melts like a cake of ice. Our possessions grow smaller and smaller. The

[471 F Supp 215]

lands of Upper Michigan were bypassed by settlers who sought agricultural lands further west. Only a few thousand Indians, organized into bands, inhabited the entire area along with a few traders and military men. These Indians used the land

---

warm wave of the white man rolls in upon us and melts us away. Our women reproach us. Our children want homes. Shall we sell from under them the spot where they spread their blankets? We have not called you here. We smoke with you the pipe of peace.'"

History of Saginaw County, 151 (1881).

The account of Cass' speech reads as follows:

"To this the Commissioner replied with earnestness, reproving the speaker for arrogant assumption, that their Great Father at Washington had just closed a war in which he had whipped their Father, the English king, and the Indians too; that their lands were forfeited in fact by the rules of war, but that he did not purpose to take them without rendering back an equivalent, notwithstanding their late acts of hostility; that their women and children should have secured to them ample tribal reserves on which they could live, unmolested by their white neighbors, where they could spread their blankets and be aided and instructed in agriculture."

History of Saginaw County, 151 (1881).

This humiliation was in fact contrary to the provisions of the Treaty of Ghent with Great Britain ending the War of 1812. Under that treaty the Indians regained in full the rights which Cass, impelled by the zest of his heroism, declares do not exist. After this initial session, negotiations continued in the presence of Cass' soldiers and 60 other whites, until a treaty was signed in ceremony for which Cass supplied 5 barrels of whiskey. Saginaw Treaty of 1819, 17 (1919).

To meet the resistance brought about by the Indians' desire to retain their hunting grounds, Cass assured them they could continue to hunt in the forests. S. Gross, supra, at 17. By this deception and by granting them the silver vested under the earlier treaty, Cass induced the Indians to believe, mistakenly, that they had won a victory and could retain their lands and their earlier treaty rights.

It is reported that in other negotiations Cass told Ohio Indians he would take a cession of their lands from Michigan Indians if the Ohio Indians did not sell. He brought the Michigan Indians to Ohio for the negotiations. (Tr. 493.)

and water, seasonally migrating over the land to secure the resources of the area.

In the 1830's some of the Indians wanted to acquire annuities like their Potawatomie brothers and realized that the United States would give such payments in exchange for land. One group indicated that it would cede Drummond Island in Lake Huron; chiefs of questionable authority offered to cede lands belonging to other Indians in order to get an annuity. Even these groups had so little understanding of American property law that they expected to continue using the land as before even after a cession.

Lewis Cass, Secretary of War, and Henry Schoolcraft, Indian Agent in Michigan, were not interested in such proposals. They ordered representatives of all area Indian bands to Washington, escorted by traders chosen because of their known influence over the Indians and who were rewarded by the terms of the subsequent treaty. Away from their forest homes for over four months, many for the first time in their lives, unable to engage in their ordinary pursuits, housed in buildings and transported over streets, the Indians signed a treaty written by white traders, explained to them by white interpreters and fostered by men who had supplied them with firewater for years. They were then permitted to return to their homes.[4] Before and during its negotiation and by the

---

[4]

Similar coercion was effected in different fashion in treaty negotiations with the Osages:

> On the 8th of November, 1808, Peter Chouteau, the United States' agent for the Osages, arrived at Fort Clark. On the 10th he assembled the Chiefs and warriors of the Great and Little Osages in council, and proceeded to state to them the substance of a treaty, which, he said, Governor Lewis had deputed him to offer the Osages, and to execute with them. Having briefly explained to them the purport of the treaty, he addressed them to this effect, in my hearing, and very nearly in the following words: "You have heard this treaty

language of the treaty, they were assured that they could continue to use the land when they returned to their homes, as before. Had they felt anxious about their fishing grounds before the negotiations, those fears were allayed: areas sought by whites were granted exclusively to the Indians, and no mention was made that the treaty might take any other fishing rights away.

By the terms of the treaty monies granted to the Indians for their land were assigned to traders to pay for Indian debts, and Henry Schoolcraft negotiated over $50,000 for his relatives. The Indians got their annuities, certain services, reservations at their traditional fishing grounds and a promise of land in the West.

But, the white men were not through with the Indians. The Senate ratified the treaty with an amendment limiting the terms of the reservations to five years or longer, as the United States might permit. This put the Indians on notice that things

---

explained to you. Those who now come forward and sign it, shall be considered friends of the United States and treated accordingly. Those who refuse to come forward and sign it shall be considered enemies of the United States, and treated accordingly." The Osages replied in substance, "that if their great American father wanted a part of their land he must have it, that he was strong and powerful, they were poor and pitiful, what could they do? He had demanded their land and thought proper to offer them something in return for it. They had no choice, they must either sign the treaty or be declared enemies of the United States." George C. Silbey, factor at Fort Osage, cited in Schmeckebier, the Office of Indian Affairs, Its History, Activities, and Organization (1927), pp. 59-60.

had not gone as they had understood them. But, Schoolcraft allayed their fears by assuring them they could continue to use all of their lands as before, leading them to understand that this use would go on without limit. Satisfied, the Indians signed the pact.

The United States did not pay all of the annuities promised; took the most important of the fishing grounds to build a canal and permitted settlers to come into the territory to such an extent that the Indians feared they would lose their reservations and there would be no land left for them. The United States wanted to secure clear title over Indian lands so that they could be sold to settlers and to concentrate the Indians in fewer locations on less land. These motivations led to a new treaty in 1855. In that treaty, signed in Detroit, the United States granted the Indians reservations and assumed specific obligations to provide services and benefits in exchange for a release from the prior treaty financial and personal property obligations it had not fulfilled. The reservations were again placed near traditional fishing grounds. In a separate treaty, the United States offered compensation for the fishing grounds granted in perpetuity and which it had destroyed at Sault Ste. Marie.

After the 1855 treaty, the United States dealt with the treaty Indians on a local basis, no longer pretending that there was an Ottawa and Chippewa Nation. More recently, it recognized the Bay Mills tribe under the Indian Reorganization Act as an Indian tribe entitled to the benefits of prior Indian treaties. Most recently, it did the same for the Sault Ste. Marie band of Chippewa Indians.

When a court is called upon to construe an Indian treaty, the Supreme Court has mandated that it employ the following

principles which flow from the guardianward relationship of the United States to the Indians: The treaty must be construed as the Indians would have understood it; doubtful expressions must be resolved in favor of the Indians, and treaties must be construed liberally in favor of the Indians. Generally, these principles are laid down so that Indian tribes, usually numbering little more than a few thousand, are not wholly disadvantaged by the strength and resources of the United States. In this case every justification ever given in support of these principles is satisfied. The treaty was imposed by subtle, invidious and incidious negotiators who sought only signatures without regard for whether they were a product of free consent; the treaties binding the Indians were written in English, although the Indians knew no English and their language arose out of a hunting and fishing tradition without a concept of property; interpreters could only describe general outlines of the agreement; details were left to the good faith of the drafters; the final version of the treaty was drafted behind closed doors by Henry Schoolcraft and the traders who escorted the Indians to Washington; these men had conflicts of interest and each was rewarded handsomely by the treaty, altogether receiving over a quarter of a million dollars.

From the history of the negotiations of the 1836 and 1855 treaties, evidence of the sort of use the Indians made of the Great Lakes fisheries at the time of the 1836 Treaty, and bound as I am to construe the treaties as they would have been understood by the Indians, I am compelled to conclude that the Ottawa and Chippewa Indians, and the plaintiff tribes as their successors, reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836, which right they may exercise without regulation by the State of Michigan.

Specific findings of fact and conclusions of law are contained in a following section of this opinion.

Insofar as any motion has been of significance, it has been ruled upon at the appropriate time. Certain insubstantial motions remain and will be dealt with summarily.

The State has before the court a motion to require the joinder of all necessary and indispensable parties. It argued that this order was necessary to bring into

[417 F Supp 217)

the action all Indians claiming fishing rights as descendants of the signatories to the 1836 Treaty. The court recognizes the position that the State finds itself in is difficult. However, a substantially similar argument was advanced by the State in support of its second motion for partial summary judgment. In that motion, the State asked that the court bring into the action all individuals who may possess any individual fishing rights as a result of the dissolution of the tribal organizations by the Treaty of 1855. The court denied that motion, and indicated that the present parties were sufficient to enable the court to pass on Phase I issues before it.

The individual defendants have petitioned this court for the right to a jury trial. Because this action involves prospective injunctive relief sought by plaintiffs, and because plaintiffs have not presented any evidence of tortious conduct by any of the named individual defendants, there is no basis for requiring a jury trial, and defendants' motion is denied.

The State's motion for a three-judge court is likewise easily disposed of.[5] The sole basis upon which plaintiffs have prosecuted this action is that the Indians possess an aboriginal fishing right which has been confirmed by treaty with the

---

[5]

Because this action commenced before the repeal of 28 U.S.C. § 2281 on August 12, 1976, that statute and interpretative case law applies to this motion. *See*, Pub.L. 94-381, § 7.

United States. Under the United States Constitution, Article VI, clause 2, a treaty made under the authority of the United States becomes the supreme law of the land. Consequently, because a treaty provision maintains the same status as a federal statute, the State cannot regulate what federal law preempts. This is the foundation of plaintiffs' allegation that the State of Michigan may not regulate federally protected fishing rights. Obviously, the plaintiffs are relying upon the Supremacy Clause of the Constitution to support their claim. The Supreme Court of the United States has indicated that a three-judge court is not necessary where the action is based on the Supremacy Clause[6] Further, any relief plaintiffs re-request is also premised on that constitutional ground. For these reasons, the State's motion is denied.

The State has indicated that several motions to compel discovery have not been ruled upon. To the contrary, the court ruled in an Order of July 30, 1976 that these motions were moot and need not be decided.

I have not considered plaintiffs' Exhibits P-1, P-2 or P-3 in my deliberations in this matter or in this opinion.

II.

JURISDICTION, ISSUES AND PARTIES

(1) Jurisdiction is vested in this Court by virtue of:

(a) 28 U.S.C. § 1345, in that the United States brings this action on its own behalf and on behalf of the Bay Mills Indian Community and the Sault Ste. Marie Tribe

---

[6]

Swift v. *Wickham*, 382 U.S. 111, 122, 124-29, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *see also, Moe* v. *Confederated Salish and Kootenia Tribes*, 425 U.S. 463, 481 n. 17, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

of Chippewa Inidians, federally recognized Indian tribes, in connection with its administration of Indian affairs and in fulfillment of its fiduciary duties;

(b) 28 U.S.C. § 1331, in that the matter in controversy involves the fishing rights of the plaintiff tribes, which in both instances have a value in excess of $10,000, exclusive of interests and costs, which are claimed to exist and to be secured under the Constitution, laws and treaties of the United States; and

(c) 28 U.S.C. § 1362, in that this action is brought by Indian tribes with governing bodies duly recognized by the Secretary of the Interior alleging violations of their rights under the Constitution, laws and treaties of the United States.

(2) Each of the plaintiffs has standing to maintain the claims asserted in this action.

(3) An actual controversy exists between each of the plaintiffs on the one hand and

[471 F Supp 218]

the defendants on the other, as to the meaning of the treaties at issue herein and the existence of any tribal right to fish in the Michigan waters of the Great Lakes under those treaties.

(4) A declaratory judgment is properly sought pursuant to 28 U.S.C. § 2201 and § 2202, and this court may grant such relief.

(5) Venue is properly laid in this court under 28 U.S.C. § 1391(b) in that all defendants reside within the Western District of Michigan.

(6) This trial has been limited to the issues identified for separate trial by this Court in its Order of July 30, 1976, which are:

> (a) Whether the Indians reserved or retained fishing rights in the Great Lakes waters purportedly ceded by them under the Treaty of 1836 (7 Stat. 491);
>
> (b) If the Indians reserved rights to fish in those waters, were those rights abrogated in whole or in part by the Treaty of 1855 (11 Stat. 621); and
>
> (c) Assuming those reserved fishing rights were not abrogated, does the State possess any jurisdiction to regulate the exercise of those rights by treaty tribe members?

The United States of America is a party plaintiff which brought this suit in its own behalf and in behalf of plaintiff-intervenor Bay Mills Indian Community and Sault Ste. Marie Tribe of Chippewa Indians pursuant to its federal trust responsibility toward those tribes.

The Sault Ste. Marie Tribe of Chippewa Indians is a present-day tribal entity which, with respect to the matters which are the subject of this litigation, is a political successor in interest to the Indians who were party to the Treaty of 1836. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government. This tribe is organized pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and By-Laws, and the membership criteria require proof that the member is an Indian of the treaty area. (Tr. 1127-29; Ex. P-120.)

The Bay Mills Indian Community is a present-day tribal entity which, with respect to the matters that are the subject

of this litigation, is a political successor in interest to the Indians who were party to the Treaty of 1836. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Bay Mills Reservation. This tribe is organized pursuant to the Indian Reorganization Act, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and By-Laws and the membership criteria require proof that the member is an Indian of the treaty area. (Tr. 1059-62, Ex. P-119.)

Defendants in this cause are the State of Michigan, its Natural Resources Commission, and certain officials of the Michigan Department of Natural Resources. The State of Michigan exercises regulatory power over the Great Lakes fishery within its borders. This power is exercised by and through defendant Natural Resources Commission, which is the state administrative agency with responsibility for regulating the Great Lakes fishery.

Defendant Howard Tanner is the Director of the Department of Natural Resources. As such he is the chief executive officer of the Department, with overall responsibility for administering the state's fisheries program and enforcing state fishing laws and regulations. John Scott[7] is the Chief of the Fisheries Division of the Department, and as such is responsible for the administration of the state's fisheries program. Louis Gray[8] is the Acting Chief of the Law Enforcement Division of the Department, and as such is responsible for the enforcement of the state fishing laws and

---

[7]

The Department of Natural Resources officers were sued in their official capacities. Names of the current holders of the positions have been substituted for those named in the Amended Complaint. *See* Fed.R.Civ.P. 25(d)(1).

[8]

Id.

[471 F Supp 219]

regulations. Together those officials are responsible for administering and enforcing the statutes, regulations, orders and policies governing the Great Lakes fishery which are challenged by plaintiffs in this case.

III.

WITNESSES

Plaintiffs' expert witness Helen Hornbeck Tanner is an ethnohistorian who has studied American Indian tribes for approximately thirty years, and who has concentrated for the last sixteen years on the study of Indian tribes of the Upper Great Lakes. She has testified as an expert witness in other cases involving issues of Indian culture and history. Her training and experience have been concentrated in analyzing and interpreting the history, culture and lifestyle of Upper Great Lakes Indian tribes. (Tr. 53-56, 66-74; Ex. P-130).

Plaintiffs' expert witness Charles E. Cleland is an anthropologist specializing in archaeology and ethnozoology. He has spent the majority of his professional career in personally investigating and analyzing Upper Great Lakes Indian tribes and their relationship to the animal species found in that area in historical and prehistoric times. (Tr. 658-92; Ex. P-141.)

Plaintiffs' expert witness James A. Clifton is an anthropologist and ethnohistorian who has specialized in the study of Indian tribes' responses to changes in their aboriginal culture brought about by European contact and dominance. He has spent more than half of his professional career in the particular study of Indian tribes of the Upper Great Lakes and the Ohio valley, including the removal policy and its implementation in that area. Further, he has extensive ex-

perience in the analysis of Algonquian personal names as written by Europeans and Americans in order to determine the pronunciation and identity of the named persons. The testimony showed that from his early training at the University of Chicago he did not follow the traditional subject matter breakdowns of American higher education but prepared to engage in the broad, reliable cultural investigations which were especially helpful to this court. The defendants' effort to impeach him for lack of compartmentalized academic certifications was comparable to an effort to disqualify Thomas Edison as an expert on electricity. (Tr. 2058-2109; Ex. P-177.)

Defendants' expert witness Phillip P. Mason is an historian and archivist whose academic training and research have concentrated on American social and economic history. The witness is not, by either training or experience, thoroughly familiar with the culture of the Upper Great Lakes Indians. His familiarity with the facts in this case rests primarily upon his work in editing the papers of Henry Schoolcraft and upon examination of documents since being retained by defendants. The limited perspective of his experience and his academic discipline, limited as they are to written accounts of the matters in issue here, prevented him from enlightening the court as to the total circumstances of the treaties. (Tr. 1214-25, 1237-47, 1252-55, D. Ex. 291.)

Defendants' witness Asa T. Wright is a fisheries biologist who has been employed by defendants in that capacity for most of his professional career. He has no educational background or experience in either history or anthropology, nor has he been trained in the research or analysis of historic documents. This lack of training, background and familiarity permitted him to offer opinions from his field of expertise which are at odds with the facts. (Tr. 1844-53, 1859-63, D. Ex. 313.)

The oral testimony of the tribal witnesses educated in the history and customs of their people by tribal elders is found to be reasonable and credible factual data regarding certain relevant aspects of Indian life at and after treaty times. (Tr. 130-32, 776-77, 1066-70, 1095-98, 1105-06, 1113-15, 1129-33.)

IV.

FINDINGS OF FACT

A. *The Indians of the Treaty Area.*

While the term "Ottawa and Chippewa Nations" is used in the treaty and by this

[471 F Supp 220]

court in its opinion, the term is a non-Indian term used to describe Indian peoples of a similar culture, and was not used by the Indians themselves in describing their political organization. The primary unit of political and economic organization was the band, which was frequently associated with a village. Political authority was weak; decisions were usually reached by consensus, and persons become "chiefs" for ad hoc purposes based upon skill. From both a political and Indian cultural perspective, there was no such thing as an Ottawa-Chippewa tribe or nation. (Tr. 100-02, 596, 772-76, 779-81.)

Four different but related tribes of Indians have been associated with the area later included within the State of Michigan—the Ottawa, Chippewa (or Ojibway), Potawatomi and Wyandot (or Huron). (Tr. 93.) The Ottawa, Chippewa and Potawatomi had an early tradition of closeness and referred to themselves as the Three Fires. (Tr. 93.) The Ottawa and Chippewa share a common language. According to Chippewa tradition, they were located originally in the valley of the St. Lawrence River and migrated westward to the northern pen-

insula of Michigan somewhere near the year 1500. Some Chippewa bands moved farther west to Wisconsin. (Tr. 93.) The Ottawas, which means "traders," were historically identified with Manitoulin Island in Lake Huron, which is a part of Canada. (Tr. 94.) The Ottawas too advanced westward and settled in the lower peninsula of Michigan with concentrations near the Straits of Mackinac. (Tr. 94.) The Wyandots lived in the area of present day Detroit since at least the early 1700's. The Potawatomis of Michigan have been identified with the southern portion of the state.

Of the four tribes discussed, only the Ottawa and Chippewa were signatories of the Treaty of 1836. (Tr. 96.) The names of the bands and their locations are as follows: In the Upper Peninsula, there was a band on Lake Superior opposite Grand Island which bore that name (Tr. 97); the eastern end of Whitefish Bay was the home of the Tahquamenon Bay band (Tr. 97); closer to Sault Ste. Marie, but still in Whitefish Bay, was the Waishkee Bay band (Tr. 123); the Sault Ste. Marie band was located in and around the city of the same name (Tr. 97); there was a Garden River band whose members spent much time in Canada and on Sugar Island located in the St. Mary's River (Tr. 98). Also near the St. Mary's River in Lake Huron was the Drummond Island band. (7 Stat. 495.) On the northern shore of Lake Michigan there was a band at the Les Cheneaux Islands (Tr. 98); there were bands at Big and Little Bay de Noc (Tr. 98); at the Beaver Islands (Tr. 98); at Little and Grand Traverse Bays (Tr. 98); and on Lake Huron there were bands at St. Ignace, Thunder Bay and Cheboygan. (Tr. 98.) The southern portion of the ceded area was the home of the Grand River bands. (Tr. 98). Included among these bands were beneficiaries of the Treaty of Ghent, which ended the War of 1812. (Tr. 1060-61, 1064, 1128, 1179.)

The bands located within the area of cession were Ottawa, Chippewa and a mixture of both. (Tr. 98.) Henry Schoolcraft described the Indians of the Treaty area as "intercalated," a minerological term to describe stratified layers of rock. (Tr. 99.) In other words, there were some distinct Ottawa groups, some distinct Chippewa groups and some groups consisting of both. (Tr. 99.) It was not possible before 1836 to draw a precise line on a map showing distinct area occupied exclusively by either Ottawa or Chippewa. (Tr. 100.) The Ottawa and Chippewa lived at peace together in their intercalated relationship. (Tr. 94-100, 177, Ex. P-17.)

The first significant American contact with the Indians of the treaty area probably began in 1820 with the Cass expedition. (Tr. 105.) Lewis Cass led an expedition into the northern portion of the Lower Peninsula and the Upper Peninsula of Michigan at a time before its exploration by any other Americans. (Tr. 105.) Before the Americans, the Indians of the treaty area had contact with the French, beginning in the middle seventeenth century, followed by the British. (Tr. 106.)

[471 F Supp 221]

The life style of the Ottawa and Chippewa during the period leading up to the 1836 Treaty was cyclical in nature. Springtime activity was devoted to the making of maple sugar. Sometimes the sugar was their only source of food during the harsh months of February and March. (Tr. 111.) In early May, the spring fishing season started and some agricultural activities were conducted, depending upon the location of a band. (Tr. 111.) The 140-day growing season line extends across Michigan at a point south of Traverse City. Thus, Indians north of that line were engaged in very limited agricultural pursuits. (Tr. 111.)

Canoe making was another springtime activity because this was the best time of the year for removing the bark from birch trees. (Tr. 111.) In the summer, food gathering occurred. In August, those crops available were harvested and shortly thereafter berries were gathered. (Tr. 112.)

In the fall, there was another significant fishing season and substantial time was devoted to this activity. (Tr. 112.) Before departing for winter hunting stations, supplies were procured from traders which were often advanced against the furs the Indians expected to trap. (Tr. 112.) The Indians dealt with traders on the basis of barter. (Tr. 112.) They traded furs and fish for supplies the traders carried. (Tr. 112-13.) It was not until after the 1836 Treaty with its provisions for annuities that the Indians had cash available to use for obtaining supplies. (Tr. 113.)

Indians were traders, of course, even before European contact. (Tr. 106.) As previously stated, the word "Ottawa" means "trader." One of the principal trade centers in the treaty area was at the Straits of Mackinac. (Tr. 106.) Early trade routes extended from Montreal down to the Gulf of Mexico and were dependent upon the Great Lakes and the Mississippi River for transportation. (Tr. 107.) After European contact, trading by the Indians continued and expanded because the Indians were then able to obtain manufactured goods like iron kettles, hooks, axes, hatchets, needles, awls and firearms. (Tr. 109.)

B. *Role of Fishing in the Lifestyle of the Indians of the Treaty Area.*

The prehistoric and historic record of the Upper Great Lakes shows a long evolutionary sequence extending back at least 12,000 years during which fishing in the Great Lakes has been of increasing importance to the Indian people of the treaty

area. The nature of the fishery resource has helped to shape the Indian culture of this area. Ecologically, the Upper Great Lakes area is a transitional area between the pine forest to the north and the hardwood forest to the south. It was low in many natural resources, including mammals. (Tr. 697-98.) The Great Lakes contained a productive fishery, however, which was characterized by Rostlund in his authoritative monograph on the aboriginal fisheries of North America as the "Inland Shore Fishing Complex." This fishery (shown on the map, Ex. P-143) lies generally north at a line demarcating 140 frost-free days. As prehistoric Indian culture evolved after the retreat of the glaciers, the Indians south of that line turned increasingly to agriculture as the main subsistence activity, while those north of the line turned increasingly to fishing. Though fish did not occur in the Great Lakes in the abundance that characterized other aboriginal fisheries, the fish did concentrate in relatively small areas in the spring and fall, primarily to spawn. This bi-modal cycle with its periods of concentration allowed the Indians to utilize the fishery resource. (Tr. 699-703.)

The earlies Indians of northern Michigan were big game hunters. The first evidence of Indian fishing in the Upper Great Lakes occurs in Late Archaic Period with archaeological sites dated between 2000 and 1000 B.C. Although the Indians of this period were primarily hunters, they began coming to the shores of the Great Lakes in the spring, when spring spawners such as sturgeon were gathered, and took fish by hook, gorge and spear. (Tr. 728-30.)

Even before this time, however, a new fishing technology was being developed and applied on the Atlantic coast which would

eventually alter drastically the subsistence and lifestyle of the Indians of the Upper Great Lakes. Fishing nets originated on the Atlantic coast around 6000 B. C. and began spreading slowly westward through the process of cultural diffusion. By 2500 B. C. nets were in use on the Lower Great Lakes. From there they spread to the Upper Great Lakes, where they appeared during the Middle Woodland Period at around the time of the birth of Christ. (Tr. 744-45.) As with the earlier fishing techniques, which remained in use, nets were first applied to the spring fishery. However, during the Late Woodland Period (which immediately preceded European contact), the primary fishery shifted from the spring to the fall, when species such as lake trout and whitefish were taken. With this major change the fishery continued to become more important and more productive. (Tr. 739-40.)

The introduction of nets and the shift of the fall fishery led to the development of the Late Woodland Period settlement pattern which was encountered by the first Europeans to enter the Upper Great Lakes. In the spring the Indians would gather in large fishing villages of around 200 persons, where they would remain until the onset of winter. In winter the village would break up into small family groups which would disperse inland to hunt. When spring came the cycle would be renewed. The warm weather fishing villages were located on the shores of the Upper Great Lakes throughout the treaty area in locations with convenient access to productive fishing grounds. (Tr. 121-23, 236-38, 733-43, 760-63, 825-30.)

By the time of first European contact around 1650 A. D. fishing had come to be of enormous importance to the Upper Great Lakes Indians. All traditional fishing methods were still in use, but the most productive was gill netting from canoes. The Indians caught both spring- and fall-spawning

species, including sturgeon, suckers, pike, whitefish and lake trout. (Tr. 130, 758-60.) Fish was a very crucial item in the Indian diet, comprising about 65% of the usable meat consumed in the warm months. (Tr. 768-71.) British and French settlements in the same area show significantly less dependence upon fish in the European diet. (Tr. 769-71.) At first contact, as in earlier and later times, fishing was the key to understanding the subsistence and settlement patterns of the Upper Great Lakes Indians.

A written record of the Indians of the treaty area began with the arrival of Europeans, though of course this record was not kept by the Indians, but by the newcomers encountering a strange culture. Nevertheless, these European and later, American observers amply documented the continued extreme importance of fishing to the Indians. Throughout the period from first contact to the 1830's, missionaries, explorers, traders, and military and governmental officials wrote of the Indian gill net fishery in the Great Lakes and of its importance to the Indian inhabitants. For example, the Frenchman Joutel wrote this detailed description of Indian gill netting at the Straits of Mackinac in 1687 (Tr. 784-75):

> They are very skillful at fishing and the fishing is very good in those parts. There are fish of various kinds which they catch with nets, made with a very good mesh; and, although they only make them of ordinary sewing thread, they will nevertheless stop fish weighing over ten pounds. They go as far as a league out into the lake to spread their nets, and to enable them to find them again, they leave marks, namely, certain pieces of cedar wood which they call "acquantiquants," which serve the same purpose as buoys or anchors. They have nets as long as 200 fathoms and about 2 feet deep. At the lower part of those nets they fasten stones to make them go to the bottom, and on the upper part they put pieces of cedar wood which the French people who were then at this place called floats.

> Such nets are spread in the water, like snares among crops, the fish being caught as they pass, like partridge and quails in snares. The nets are sometimes spread in a depth of more than 30 fathoms, and when bad weather comes, they are in danger of being lost.

[471 F Supp 223]

Cadillac in 1695 described the same fishery as a "daily manna, which never fails." (Tr. 785.) Many similar accounts were placed on the record. (Tr. 105-08, 154, 113-20, 782-89, 791-94.) These historic and ethnographic materials were summarized by Rostlund in his authoritative work in this fashion (Tr. 796):

> [A] gill net fishery par excellence in native North America was found in this region of great interior lakes inhabited by the whitefish family; and it may be added that this great food resource could not have been adequately exploited had the gill net been unknown. • • • [A]s fishermen those people . . . were second to none in the aboriginal North America.

Long before European contact, the Indians of the Upper Great Lakes had participated in a far-flung trade and exchange network which extended at least as far south as the Gulf of Mexico. (Tr. 106-07; Ex. P-142.) This was not, however, a proper commercial network, because commercial activity requires a market economy based upon a system of exchange using understood equivalents, and such a market economy was absent from the Upper Great Lakes in aboriginal times. The Europeans brought with them their market economy, and with it an opportunity for the Indians to participate in an entirely new aspect of the fishery—a commercial fishery. (Tr. 797-99.) From that time onward, the commercial fishery as well as the subsistence fishery was important to the Indians. As is also indicated by the Indians' adoption of nets, the

Indians' participation in commercial fishing as soon as this opportunity presented itself, reveals that the Indians' participation in the Great Lakes fishery was never static, but evolved as new opportunities became available.

As early as the middle of the 18th century Indians were participating in a commercial fishery by trading fish to the French at Michilimackinac. (Ex. P-8, 9.) Before the 19th century, however, the main Indian commercial activity was in the fur trade. The fur trade was on the wane in the early 19th century. By that time the Indians had become dependent upon manufactured trade goods and needed to continue their participation in the market economy. They naturally turned to fish as a commodity which could produce a surplus for trade. (Tr. 124, 799-801.) In the 1830's the fur companies began to turn to fish as well. Foremost among them was the American Fur Co., which operated a fishing enterprise on Lake Superior from 1835 through the early 1840's. It principal fishing operations were west of the treaty area, but it did operate fishing stations at Whitefish Point and Grand Island. (State Ex. 309.) The American Fur Co. and its rivals developed a market for Upper Great Lakes fish and provided a ready outlet for the purchase of Indian fish and employment of Indian fishermen. (Tr. 153-55, 437-43, 801-07.) The fishermen for the American Fur Co. were largely Indians, who were the major producers of fish in Northern Lake Michigan, Northern Lake Huron and Lake Superior for the entire first half of the nineteenth century. (Tr. 281, 803-05, 807-09, 970, 973, 1559.) Indian names do not appear in the employee roles of the American Fur Co., however, probably because Indians fished as subcontractors. (Tr. 1781-82.)

The evidence firmly establishes that the Indians of the treaty area were heavily engaged in commercial fishing at the time of the Treaty of 1836, both as employees and as independent fishermen. The Blois *Gazeteer* of 1840 described

one type of Indian participation in the commercial fishery (Tr. 804):

> At Mackinac, St. Mary's Strait, and Lake Superior, the fishermen are composed of French, Indians, and Mestizoes or half-breeds. They are generally employed by capitalists and in Lake Superior by the American Fur Company, furnished with necessary outfits, and paid in such goods as their necessities may require.

Grace Lee Nute, in her article on the American Fur Co., which was relied on by the experts on both sides, also indicates that the American Fur Co. engaged Indian fisher-

[471 F Supp 224]

men (State Ex. 309, P. 489), and a contract between an Indian fisherman and the company for fishing at Whitefish Point in 1837 was also introduced. (State Ex. 226.) Indians also barrelled their own fish and sold them to traders (State Ex. 50), and traders contracted with intermediaries like Charles Butterfield to purchase fish from Indians. (Ex. P-176.) Indian commercial fishing is evidenced in the treaty itself as well; under the sixth provision of Article Fourth, the Indians were to receive 100 barrels of salt and 500 fish barrels annually for twenty years.

Subsistence fishing continued to be tremendously important to the Indians of the treaty area in the 1830's. The introduction of the market economy, the fur trade and the dependence of the Indians on trade goods did not alter the subsistence dependence of the Indians on the fishery; to the contrary, as Fitting reported in his "Patterns of Acculturation at the Straits of Mackinac," those factors actually *increased* and amplified the importance of fishing. (Tr. 766-67.) Fish remained the staple of the Indian diet. This factor was stressed by Lewis

Cass, who in 1820 wrote that for the Indians of the treaty area fish "constitute a considerable part of the food of all the Indians upon this extensive frontier. Deprived of this means of support, they must absolutely perish." (Tr. P-20 and 20A.)

In 1836 the settlement pattern of the Indians was the same as it had been for centuries, since the introduction of nets: in the warm months the Indians were concentrated in large fishing villages, and in the winter the villages broke up into family groups who went inland to hunt and trap. The Indians were living on the shores of the Great Lakes throughout the treaty area adjacent to the productive fishing grounds. (Tr. 97-100, 121-23, 236-38, 760-68, 825-30.) This settlement pattern is shown in the Treaty of 1836 itself—in the location of the reservations and of the chiefs listed in the schedule supplemental to Article Tenth. It is also shown in Henry Schoolcraft's 1837 map and census (Ex. P-125; State Ex. 311) and in similar exhibits. (State Ex. 63, 284.)

Despite this settlement pattern and the concentration of fishing in the areas of settlement, Indian fishing was not confined to these areas. Indians of the treaty area, before and during treaty times, traveled extensively, and to the most remote areas of the Great Lakes. (Tr. 127-29, 753-54.) They had various sizes of canoes, adapted to different purposes, and used these in their travels. (Tr. 469-71.)

In sum, in 1836, fishing in the waters of the Great Lakes for both subsistence and commercial purposes was extremely important to the Indians of the treaty area. (Tr. 559, 807, 1762-3, 1773, 1785, 1788-89, 1792-99, 1801, 1886.) Dr. Cleland described the Indian fishery in 1836 as a "vitally important resource for the survival of those people, and upon the advent of a commercial system, a means by which they made their principal living during a very difficult era" and as "the primary cornerstone of their cultural being." (Tr. 831.)

Fishing remained enormously important to the Indians of the treaty area up to the Treaty of 1855. This is amply documented by a variety of sources, from the Morman leader Strang of Beaver Island to the official reports by Indian agent. (Tr. 120-21, 156-63, 165-75, 808-09.) Store ledgers of local traders and merchants indicate that Indians were obtaining cash credits for barrels of fish on both a large and small scale. (Ex. P-166, 167, 168, 169, 170, 171, 172, 173, 174, 175.) A particularly fertile source for such evidence is the annual reports of the Commissioner of Indian Affairs to Congress, which include reports of local agents, sub-agents and the like. In the report for 1842, for instance, the Indian school at St. Ignace complains of poor attendance "caused by frequent absence of families from home, pursuing their calling as fishermen." (State Ex. 269, No. 36.) The report for 1844 states that an increased demand for fish has improved the economic position of Indian fishermen. (Ex. P-66.) In 1848 the Indians of the subagency at Sault Ste. Marie sold at least 1200 barrels of fish. (Ex. P-72.) In 1852 Rev. Pitezel reported to the Commissioner (Ex. P-75):

[471 F Supp 225]

> One means of their subsistence must be, from the nature of things, fishing. Lake Superior abounds with the finest fish. As long as they reside about the lake, this occupation must be to them what the farm is to the farmer, or the trade to the mechanic.

Similar statements occur in other reports of the period. (Ex. P-67, 69, 70, 71, 73, 77, 79.) In 1855 fishing in the Great Lakes remained the primary Indian subsistence activity and was perhaps an even more important commercial activity than at earlier times. (Tr. 169-70, 824-25, 831-32.)

Fishing remained an important activity of the Indians of the treaty area throughout the remainder of the 19th century. The Mackinac Agency reported to the Commissioner of Indian Affairs in 1861: "Those bands residing near the Great Lakes still depend, to a great extent, on fishing for a livelihood." (Ex. P-98, p. 5.) In 1860—the first year in which Indians were counted— the census for northern Michigan showed that Indians and half-breeds dominated the commercial fishery. (Tr. 809-14; Ex. P-156.) Indian participation remained high and actually increased slightly by the 1880 census. (Tr. 815-18; Ex. P-157, 158.) Smith and Snell's survey of commercial fishing in the Great Lakes in 1885 also showed heavy Indian participation in the fishery of the northern Upper Great Lakes. (Tr. 818-23; Ex. P-4.)

Indian involvement in the Great Lakes fishery has continued through this century to the present day. The Bay Mills Indian Community is a fishing community whose members have always fished for subsistence and commercial purposes. As one member, Don Parish, put it: "[F]ishing was our way of life, it was our livelihood, and fishing is our living, so we just had to fish." (Tr. 1116.) Other tribal witnesses expressed similar sentiments. (Tr. 1064-66, 1075-79, 1094-1102, 1129-37, 1160-64, 1184-86.) Indian fishermen still live in the same areas and fish on the same fishing grounds as did their ancestors for centuries past. (Tr. 1064-66, 1070-74, 1075-79, 1094-1102, 1113-16, 1138-39, 1161-62, 1171-73; Ex. P-129E, 135, 135A, 136, 136A, 136B, 136C, 136D.) Indian fishing of today is remarkably like Indian fishing in 1836, and not much different from Indian fishing two millenia before that.

C. *Negotiation of the Treaty of 1836.*

When the United States negotiated treaties with the Indians of the Territory of Michigan, it was bound by certain responsibilities imposed by previous Treaties and Laws. The first of these is the Northwest Ordinance, discussed above. Addition-

ally, the United States undertook certain obligations towards the Indians, and restored all aboriginal rights, through the treaty which ended the War of 1812 with Great Britain, the Treaty of Ghent, signed on December 24, 1814 (8 stat. 218). This Treaty was referred to by Henry Clay, Senator from Kentucky, in a speech before the Senate on a Resolution concerning the Cherokee Indians in Georgia:

> He alluded to the negotiations between Great Britain and the United States, for the termination of the late war. The hinge on which the negotiation turned, he had a distinct recollection, was the claim brought forward by the British negotiators on behalf of the Indians, and which they held as a *sine qua non* to the conclusion of a treaty of peace—that the Indians, her allies, should have a permanent boundary assigned them, and that neither party should be at liberty to purchase the lands they set apart. But the American commissioners would not listen to the proposition so much as to refer it to their Government, informing the British commissioners that, if they did so, they were sure it would meet with the most prompt rejection. They stated that the Indians lived under their own customs, and not the laws of the United States, and that they were placed under the protection of the United States alone, whether they were subjects or otherwise. The correcspondence finally terminated in a proposition to which the American commissioners assented, that the United States should do their best endeavors to restore peace with the Indians with which they
>
> [471 F Supp 226]
>
> were at war, and restore to them all the rights and privileges they enjoyed prior to the commencement of hostilities. And he declared it to be his belief that, if the Indian rights had not been thus declared, there would have been a prolongation of the war.

The Congressional Globe, February 3, 1835, at 195. It should be noted that Henry Clay was a negotiator and signatory of the Treaty of Ghent for the United States.[9]

A treaty can be analogized to a special kind of contract and, like all contracts, the motivations of the parties can, and often do, differ substantially. There were two principal parties to the treaty—the United States and the Indians—but each party represented a collection of individual interests. (Tr. 132.)

Some Indians in the treaty area were interested in obtaining annuities like their neighbors the Potawatomis. (Tr. 133.) Others wanted to protect their special, customary fishing grounds from non-Indian fishermen. (Tr. 133.) Still others, in particular the Indians in the Upper Peninsula, wanted to secure blacksmith services to make and repair metal equipment, especially implements used for fishing. (Tr. 133.)

Representatives of the United States also had differing motivations for treating with the Indians. Henry Schoolcraft, principal negotiator for the United States, was concerned

---

[9]

The above comment on the negotiations on the Treaty of Ghent was placed in historical perspective by Samuel Eliot Morison in *The Oxford History of the American People* (1965) at 397-98:

> To the astonishment and distress of the American peace commissioners . . . their opposite numbers were instructed to admit neither impressment nor neutral rights as even subjects of discussion. The United States must abandon all claims to the Newfoundland fisheries, the northeastern boundary must be revised to provide a direct British road between St. John, N.B., and Quebec; and the northwest boundary must also be rectified to give Canada access to the Upper Mississippi. Finally, the old project of an Indian satellite state north of the Ohio river was revived. Adams, an experienced diplomat, expected the negotiations to terminate on this point, and prepared to go home. Henry Clay, untrained in diplomacy but an expert poker player, was confident the British would recede, as they did. On 16 September, the British commissioners were instructed to drop the Indian project.

about national security and wanted to secure the Upper Peninsula against British encroachment. (Tr. 134, 163-65.) As a mineralogist, Schoolcraft believed there were valuable mineral deposits in the area, such as salt and coal, and he wanted to be sure there would be no impediments to the government's exploitation of these minerals if rumors of their existence later proved accurate. (Tr. 134.) Traders, who played a major role in the treaty process, were owed large sums by the Indians and a treaty was the best way to be certain these debts were paid. (Tr. 136.) There was also significant pressure for statehood in the early 1830's. Early Michigan leaders, like Lewis Cass and Senator Lucius Lyons, wanted to attract settlers to the area and in order that there be available land, the Indians' title had to be extinguished. (Tr. 135, 1305.) Michigan territory in the early 1830's was not experiencing the same settlement rate as in Ohio, Indiana and Illinois. (Tr. 1294.) Reasons included the large Indian population in Michigan and settlers' fears of confrontation with them; a lack of roads to allow settlement of the interior; harsh weather conditions, and the like. (Tr. 1294.)

The dominant motive appears to have been to cheat the Indians out of their land and reduce their holdings to the reservations. Thereby the Indians would be deprived of their natural habit of roaming the range of the lands on their summer and winter migrations. Thereby the Indians would be deprived of their lands before they realized their eventual value. The figure received for the land—12½-13 cents per acre—indicates that the Indians were cheated out of their land. (Tr. 210, 27, 275, 2134-36, 2380-84.)

By 1836, much of the Indians' aboriginal title to Michigan land had already been extinguished through various treaties. In 1807 the United States obtained the land around Detroit under the Treaty of Detroit. (Tr. 1295.) The United States acquired

[471 F Supp 227]

land in southwestern Michigan (below the Grand River) under the 1822 Treaty of Chicago. Under the Treaty with the Saginaw Chippewas in 1819, the United States acquired land in the eastern side of the Lower Peninsula up to Thunder Bay on Lake Huron. (Tr. 1295-96.)

In the fall of 1835, a small group of Indians (primarily Ottawas) made their way to Washington, D.C. to talk to government officials about a treaty. (Tr. 136.) The arrival of this group of chiefs with limited authority provided Schoolcraft with occasion to emulate Cass in the negotiation of the Treaty of Saginaw. Having found out about this group, Schoolcraft hastily departed for Washington, D.C. as well. (Tr. 139.) The United States seized upon these events as an opportunity to purchase lands from all the Indians in the area, and quickly expanded the scope of the purchase to include all of the area of Michigan eventually ceded in the Treaty of 1836. (Tr. 135-36, 606-07, 1315-26.) Schoolcraft aggressively sought other chiefs in order to seize another tract of "that very valuable land." In early 1836, a larger delegation of Indians was escorted to Washington, D.C. in order to negotiate a treaty. (Tr. 139.) Most of the escorts were traders from throughout the area of cession. (Tr. 139.) The escorts were arranged for, in most instances, by Schoolcraft and other government officials. (Tr. 139.) Documents support the notion that the presence of traders was essential if the United States was to accomplish a cession of Indian lands. (Tr. 140; Ex. P-46 and 46A.) Some traders, such as Robert Stuart, John Drew and Edward Biddle, were associated with the American Fur Co. (Tr. 141-42.)

Dr. Helen Hornbeck Tanner, plaintiffs' principal ethnohistoric witness, testified that:

> Fur traders were widely used as mediators in effecting Indian treaties and were usually present, and in some cases, beneficiaries of the Treaty. Their personal contacts with the Indian people were important, in one way, and their influence over them appears to have been considerable.

(Tr. 142.)[10]

In the spring of 1836, the process of selecting Indian representatives and transporting them to Washington began. The selection of the traders who accompanied the Indians was initiated and controlled largely by the United States, acting through Henry Schoolcraft and his agents. Schoolcraft sent for his relatives, Waishkee and his son Waw-be-geeg, to represent some of the Upper Peninsula bands. (Tr. 142.) At this same time, a power of sale was being circulated amongst the Indians for their signatures (marks) to be affixed. This power of sale (Ex. P-47 and 47A) was sent to Washington and arrived while the treaty negotiations were taking place. (Tr. 143.) Indian delegates came from Muskegon, Grand River, Michilimackinac, Sault Ste. Marie, L'Arbre Croche and Grand Traverse. One group from Grand River did not come under trader escort and a trader was summoned to attend the negotiations. While

---

[10]

Defendants' Exhibit 312 contains a detailed list of the claims traders submitted for payment under the treaty. For example, Edward Biddle received more than $45,000 (Ex. 312, Claim No. 63, Tr. 1621). Rix Robinson, Robert Stuart, John Holiday, John Hulbert and Henry Levake received, in toto, approximately $57,000 as claimants under the treaty. (Ex. 312, Tr. 1625-33.) Altogether, claimants or creditors received $220,954.57 under the treaty. (Ex. P-321, Tr. 1633.) All these persons played a major role in the treaty process, including accompanying various bands to Washington, D.C. Most of these persons were listed at the end of the treaty signifying their attendance and participation in the negotiation process. Perhaps the most prominent figure in the treaty process was Henry Schoolcraft. His family members received approximately $53,000 under the treaty as creditors to the Indians. (Ex P-132; Tr. 1636-42.)

in Washington the Indian delegates were placed in charge of Rix Robinson, Robert Stuart, John Drew, H. A. Lavake, William Lasley, George Moran, Lewis Moran, Augustus Hamelin, and Leonard Slater. All were traders except Hamelin, and educated half-breed, and Slater, a missionary. (Tr. 96, 139-43, 145-47, 177-79, 1326-30, 1334-47; Ex. P-15, 46, 47.) The United

[471 F Supp 228]

States paid all of the expenses incurred by the Indians in order to transport them to Washington (Tr. 147), including providing them with clothes and other gifts. Once in Washington, the Indians were housed and fed at the expense of the government.

Lewis Cass was the Secretary of War in President Jackson's administration, and, being a military man, he knew full well that "Andrew Jackson's 'requests' were in fact orders," when it came to Indian matters. [11] This attitude was in turn conveyed to Henry Schoolcraft in a letter authorizing him to treat with the Indians. (Ex. P-53.) Cass' instructions directed Schoolcraft to obtain a cession of Indian land, in part to facilitate the advancement of non-Indian settlers. He was told not to allow individual reservations but if reservations were provided for, the Indians should hold them in common until later ceded to the United States. (Tr. 149.) Other instructions required him to determine that the Indian representatives were genuine and authorized to cede land and to obtain as large a cession as possible. No claims for debts were to be settled in the treaty itself unless the Indians insisted upon it. Annuities of twenty years duration were to be provided. (Tr. 148-50, 1345-49; Ex. P-53, D. Ex. 16.)

Schoolcraft made an opening statement to the assembled group in which he explained why the treaty was to be nego-

[11]

American Heritage Pictorial History of the Presidents, Vol. 1, p. 224 (1968).

tiated with both the Ottawa and Chippewa rather than negotiating two separate treaties. Schoolcraft stated the President of the United States believed the Ottawa and Chippewa to be "brother tribes." Article First of the treaty refers to "the Ottawa and Chippewa nations of Indians." However, the Indians did not think of themselves as "nations" nor were they organized politically at the tribal level. (Tr. 773.) The term "nation" was coined by non-Indians to facilitate treating with the Indians. (Tr. 101.) Treaties, after all, were used to memorialize agreements between foreign countries. The analogue was applied to agreements between the United States and Indians until 1871 when it was outlawed by Congress.[12] The Indians usually referred to themselves as "the People." (Tr. 101.)

The treaty minutes also reflect that some Ottawa bands from the Lower Peninsula did not want to sell their land while the Indians in the Upper Peninsula were more willing to sell (Tr. [illegible].) The treaty commissioners tried to use the Chippewa's willingness to sell to shame the Ottawas into agreeing to a cession. (Tr. 178-79; Ex. P-17A, pp. 10-11.)

Interpreters, many of whom were inefficient, were always required during treaty negotiations because the Indians, with only minor exceptions, did not speak English. Of course, they could not read or write English either and those signing the treaty did so with a mark and not a signature. (Tr. 180.) In 1838 Schoolcraft commented on the incompetence of interpreters as follows: "The department is very much in the hands of ignorant and immoral interpreters, who frequently misconceive the point to be interpreted. Could we raise up a set of educated and moral men for this duty, the department would stand on high grounds." Personal Memoirs, p. 583, cited in

---

[12]
25 U.S.C. § 71.

Schmeckier, The Office of Indian Affairs, Its History, Activities and Organization (1927), p. 59.

The Indians referred to the treaty commissioners as "Father" which was a sign of respect. (Tr. 187.) They saw human relations in very personal terms (Tr. 187), and the term "Father" also signified the Indians' understanding that the treaty commissioners were authority figures. The Indians expected them to look out for Indian interests, as they were obliged to do as trustees for the Indians.

The 1836 treaty minutes also revealed an important matter which must not be overlooked. Discussions at the large sessions were concerned with generalities and concepts only. Each band designated its escort to sit down and formulate the actual treaty language and provisions out of the presence of the Indians. The escorts, with the sole

[471 F Supp 229]

exception of Augustus Hamelin, were all traders with a substantial pecuniary interest in seeing that the treaty negotiations were consummated. (Ex. P-17A, pp. 13-14; Tr. 183-87.) Unfortunately, there are no records reflecting the nature of these closed door drafting sessions. Dr. Tanner testified:

> . . . but it does appear that the Treaty was actually formulated when the traders got together. There is very little discussion in these Treaty Minutes, if any, about the actual provisions of the Treaty that was later presented to the Indian people, but there is no record of what transpired when the group of Indian traders were together in closed session and emerged with 13 articles of a Treaty that was presented to the Indians to sign.

(Tr. 183-84.)

The language in the Treaty of 1836 is the language of Henry Schoolcraft. (Tr. 183, 1367.) From an examination of the transcript it can be determined that he was a subtle, invidious and insidious negotiator who convinced the Indians to trust him in these dealings.[13] (Ex. P-17.) In shaming the reluctant Chippewas, Schoolcraft evidenced his disdain for the Indians' intentions and interests. The Ottawas declared: "We have decided we don't want to sell our land at all." To this Schoolcraft responded: "Well all right. I will deal with the Chippewa, and then they will go home with presents, and you will go home with nothing and you will all be ashamed." (Tr. 179.) Quite simply, he relied upon fraud and duress. (Tr. 493-96.)

Judging from the amount of territory which they ceded to the United States, and the paltry sum which they received in exchange,[14] it is probable that when the Ottawa and Chippewa Indian Chiefs signed the Treaty of 1836, they were under the influence of alcohol and did not know what they were doing. Accounts by Henry Schoolcraft and others indicate that these Indians were no longer rational when the whites made alcohol available to them.

> It is the use of ardent spirits, however (*an article which is freely supplied*), that constitutes their chief bane, converting that which would otherwise be a season of plenty

---

[13]

Schoolcraft's behavior as a negotiator is also shown in another Michigan treaty. During the negotiations of an 1837 treaty with the Saginaw Chippewas Schoolcraft met an impasse. The Indians would not sign unless the treaty granted 640 acres to a doctor who served them during a smallpox epidemic. It did not; they refused to sign and left. Schoolcraft later recalled them and assured them the proposed version of the treaty contained the provision. They signed on the basis of this representation. It still did not. *History of Saginaw County* (1881) p. 157.

[14]

The price per acre of ceded land happens to coincide with the price traders charged per quart of whiskey at the time. (Tr. 245.)

and good humor, into a gloomy and revolting scene of riot and drunkenness, followed not infrequently by disease, and sometimes by death. This is not the whole . . of the evil. The facility with which the Indians part with their money becomes the secret motive of their being advised to call on the agents of the Government for their vested funds; and they thus become dupes of the artful and designing. (D. Ex. 252, p. 347.) (Emphasis supplied.)

Could ardent spirits be kept from these unfortunate beings, it would be unnecessary ever to remove them . . .. A considerable number have joined that church, and appear to walk orderly, but some of the heathen portion of these bands are much degraded by the baneful effects of whiskey. They [sic.] American Fur Company, however, and some other respectable traders in that vicinity, have now determined to deal no more in spirituous liquors themselves, and are disposed to give every aid they can to the Government to put a stop to this nefarious traffic. (D. Ex. 269, p. 408.)

Sir: I have the honor to report to you that the condition of the Indians at this sub-agency has been better than during the past year. There have been few instances of intoxication, and a greater disposition to provide for their families was evinced by many. (D. Ex. 269, p. 411.)

[471 F Supp 230]

In *The Oxford History of American People*, Morison describes the common practice at treaty signings: "The assent of the Indians was often merely nominal: federal commissioners bribed important chiefs and, if necessary, got them drunk enough to sign anything." (At 446.) This practice was not foreign to Michigan treaty negotiations nor to the principals responsible for the 1836 treaty. Lewis Cass, Secretary of War

in 1836, negotiated the Treaty of Saginaw in 1819 and supplied 5 barrels of whiskey to the Indians on the day of the signing. F. Dustin, *The Saginaw Treaty of 1819*, 17 (1919). One of the traders representing the Indians in Washington in 1836 had engaged in extensive liquor trade with the treaty area Indians, claiming approximately $16,000 debt for liquor at the time. (Tr. 1621-23.) This man, Drew, and Rix Robinson, another of the escorts, were identified by Robert Stuart as the two men who were necessary for the success of the treaty negotiations. (Tr. 142.) In turn, Robert Stuart and Rix Robinson claimed debts for liquor on their own behalf or on behalf of the American Fur Co. (D. Ex. 312, pp. 40, 48, 50, 55.) It is unlikely the long-standing practice of supplying liquor to Indians stopped abruptly when these traders arrived in Washington, motivated as they were by the prospect of collecting thousands of dollars of purported debts created over a period of years. Use of liquor was one vehicle of the peonage they exercised over the Indians.

The convergence of such circumstances makes it reasonable to conclude that fueling the Indians with alcohol provided by traders was the final weapon Schoolcraft depended upon to effect the government purpose of evicting the Indians from their lands and to conquer the resistance of will he met when he sought cession of more than scattered parcels. Schoolcraft was, in the words of Dr. Tanner, prepared to use any means to achieve a treaty. (Tr. 494.) Besides using distortion, extortion and duress, he held out the carrot of silver and whiskey, relying on traders to supply whiskey during negotiations. The Indians' assent to the treaty was, accordingly, merely nominal.

The negotiation of this treaty is rent through with deception, manipulation and double dealing. The traders who accompanied the Indians to Washington were creditors for the Indians and would greatly profit from any provision which set aside money for the payment of Indian debts. (Tr. 262,

1731-32.) Some of these traders were dishonest. The fact that most of the traders who accompanied the Indians received money in payment of Indian debts from the treaty indicates that the Indians were improperly represented at the treaty negotiations, that the treaty does not contain their wishes or represent their best interests, and that much of the payment received by the Indians for their land was dishonestly and improperly dissipated in the payment of Indian debts. (Tr. 1616-33.) In addition, the traders, and Schoolcraft, struck upon the device of granting their own Indian families reservations in order to receive compensation of over $48,000. (Treaty of 1836, Article Ninth.) The American Fur Co. was a major creditor to the Indians of the area; it had a substantial interest in the form of the final treaty; it was in a position to have intimate knowledge of the treaty negotiations and influence those negotiations. The daughter of one of the interpreters at the treaty negotiations, John Holliday, wrote frequently, and often daily, to Ramsay Crooks, the President of the American Fur Co. Her father was also one of the seven partners of that company. The court takes this as evidence of improper influence over the Indians, and an indication that the terms of the Treaty of 1836 do not necessarily contain the intent or represent the true desires and agreements of the Indians. (Tr. 1333, 1340-45, 1633-36.)

Henry Schoolcraft led the treaty negotiations even though he had a conflict of interest. In its final form the treaty provided $53,000 to relatives of Henry Schoolcraft in payments of Indian debts. Some of his relatives were traders, a fact which surely influenced him in his negotiation of the provisions of the treaty. (Tr. 1636-41.) Further, some of Schoolcraft's relatives received payments under Article Ninth of the

[471 F Supp 231]

Treaty. It provides for payment of monies to half-breeds. Knowledge that the passage of a treaty would greatly benefit his family was inconsistent with Schoolcraft's involvement in the negotiations. (Tr. 1642-49.)

Later on in this opinion I will deal with the Indians' understanding of the treaty in greater depth. It is sufficient to note here that they apparently were led to believe that they were to receive land, not that they were to cede it away. (Tr. 321-23.) *See, Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 553, 8 L.Ed. 483 (1832). It is apparent from the testimony of the witnesses and the documentary evidence that the Indians of this area were devoted to a way of life which included, and was premised upon, hunting and fishing. It is inconceivable that they would have given up that way of life and signed a treaty which they understood to make that way of life impossible.[15] (Tr. 267-75, 831-32.)

D. *Provisions of the Treaty of 1836.*

The precise boundary of the cession was not known in 1836 because most of the land area was uninhabited and had not been thoroughly explored. At the time of the treaty no one knew the shape of the northwestern side of Lake Michigan. (Tr. 191.) Some interior areas near Grand and Little Traverse Bays were not surveyed until 1855. (Tr. 191.) In Article First of the Treaty of 1836 the Indians of the treaty area ceded to the United States the following area:

---

[15]

The dedication to the Indian way of life is illustrated by the Chippewa and Ottawa reaction upon seeing the land west of the Osage River to which the government wished the Indian tribes to remove. Once they saw that there were no "sugar bush," or sap bearing maple trees, an important part of their life, the Indians refused to consider removal any further. (Tr. 1414, D. Ex. 62, 95.)

> Beginning at the mouth of the Grand River of Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago of the 29th of August 1821, thence, in a direct line, to the head of Thunder-bay river, thence with the line established by the treaty of Saginaw of the 24th of September 1819, to the mouth of said river, thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, then northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's to a point in Lake Superior north of the mouth of *Gitchy Seebing*, or Chocolate river, thence south to the mouth of said river and up its channel to the source thereof, thence in a direct line to the head of the *Skonawba* river of Green bay, thence down the south bank of said river to its mouth, thence, in a direct line, through the ship channel into Green bay, to the outer part thereof, thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east to the place of beginning, at the cape aforesaid, comprehending all the lands and islands, within these limits, not hereinafter reserved.

This area includes the waters of the Great Lakes and the connecting waterway (St. Mary's River) out to the international or state borders. The area is shown on a map attached as Appendix 1. (7 Stat. 491; Tr. 188-93; Ex. P-129, 129A.)

In Articles Second and Third of the Treaty of 1836 fourteen reservations in common were retained in the following locations: Little Traverse Bay, Grand Traverse Bay, on or north of the Pere Marquette River, on the Cheboygan River, on Thunder Bay, on the north shore of Lake Michigan between Point-au-Barbe and the Mille Coquin River, the Beaver Islands,

Round Island in the Straits of Mackinac, the Les Cheneaux Islands and land in the Upper Peninsula adjacent thereto, Sugar Island, at the Little Rapids of the St. Mary's River, a large tract on Whitefish Bay of Lake Superior and westward in the Upper Peninsula, Grand Island and at the head of Bay Noc. These reservations are shown on the map attached

[471 F Supp 232]

hereto as Appendix 1. In addition, the reserve at the St. Mary's Rapids retained in the Treaty of 1820 was continued. In accordance with the treaty instructions, the reservations in the original treaty were of unlimited duration. (7 Stat. 491; Tr. 148-49, 193-99, 246-47, 250-51, 610-12; Ex. P-41, 53, 125, 129B; D. Ex. 311.)

Two of the reservations retained by the Indians in the Treaty of 1836 specifically include the fishing grounds in the Great Lakes adjacent to the land reserve: The reserve on the north shore of Lake Michigan and the reserve on Whitefish Bay of Lake Superior. These two locations were the only fishing locations where friction had developed between the Indians and whites before the Treaty of 1836. (7 Stat. 491; Tr. 236-45; Ex. P-21, 23, 27, 37.)

The reserved area described in Article Third at Whitefish Bay includes within it a portion of the Bay. There is a metes and bounds description of the land area followed by the words: ". . . including the small islands and fishing grounds in front of this reservation." Schoolcraft's 1837 map (Ex. P-125) shows a longitudinal line extending out into Whitefish Bay. Dr. Tanner testified:

> It is a matter of some interest, I conclude, that there is discernible on this map a line from the mouth of the Tacquimenon [sic.] River out to the International Border

that would encompass the small islands and fishing grounds in front of the reservation that are referred to in the language of the Treaty.

(Tr. 197.)

Q: [By Mr. Greene] So, in summary, then, that line on the Schoolcraft map adjacent to the land reserve at Whitefish Bay goes out into the water and includes some portion of Whitefish Bay, is that correct?

A: [By Dr. Tanner] Yes, it does.

(Tr. 198.)

As originally negotiated there was no limitation on the period of time the land reserves might remain Indian lands. (Tr. 199.) Subsequent to the treaty negotiations in March, 1836, the United States Senate unilaterally added the following language to both Articles Second and Third:

Article Two, line two, after the word, "tracts," insert the following words, to wit: "for the term of five years from the date of the ratification of this treaty, and no longer," unless the United States grant them permission to remain on said lands for a longer period.

Article Three, after the word "tracts," in the second line, insert the following words, to-wit:

"For the term of five years from the date of the ratification of this treaty, and no longer, unless the United States grant them permission to remain on said lands for a longer period."

(7 Stat. 497.)

In July, 1836, the Indians were summoned to Mackinac in order to obtain their assent to the Senate's unilateral amendment. (Tr. 202; Ex. P-57 and 57A.) On July 18, 1836, Henry

Schoolcraft wrote a cover letter to Lewis Cass, Secretary of War, over the Indians' assent to the unilateral Senate amendments. In that letter he said:

> Sir: I have the honor herein to enclose to you articles of assent to the Senate's amendments of the Treaty of the 28th of March last, concluded in a general council of the Chippewa and Ottawa chiefs convened at this agency on the 12th, 14th, 15th and 16th instant. The cession of the reservations at the expiration of five years has been strenuously opposed by a part of the chiefs, but was finally yielded, on a consideration of the practical operation of the provision contained in the 13th article of the treaty, which seemed to them indefinitely the right of hunting on the lands ceded, with the other usual privileges of occupancy until the land is required for settlement.

(Ex. P-18 and P-18A, p. 2.) There was considerable Indian opposition to the insertion of the language adopted by the Senate. (Tr 204.) However, the Indians apparently assented to the Senate amendment, because even though the language was in part moti-

vated by those persons wanting to remove the Indians from Michigan, it appears the Indians' fears were assuaged by Schoolcraft's explanation of Article Thirteenth. Thus, despite the fact that the land reservations might not last indefinitely after the Senate amendment, the right to hunt, fish and gather the fruits from all the ceded territory (not just the reservations) would last *indefinitely*. (*See* Ex. P-18A, p. 2.) In Indian tradition it is said that the Indians retained the right to fish and hunt "as long as the sun rose and the waters flowed." (Tr. 1071.)

Dr. James A. Clifton, plaintiffs' rebuttal expert on removal treaties, testified that although he had read virtually every removal treaty, he had not recalled seeing the particular language of the Senate amendment ever before. (Tr. 2267.) Relying on Schoolcraft's memoirs (State Ex. 304, p. 538), Clifton testified:

> Now his [Schoolcraft's] explanation, as nearly as I can make out what is going on here, is that Senator Hugh White [Chairman of the Indian Committee in the Senate] for personal political reasons, asserted these alterations in these Treaties, and not for any other reason . . . . These alterations were inserted in the Treaty, not because of any practical consideration or because of any need for land in Michigan, but for internal political reasons involving the Senator and President Jackson.

(Tr. 2271.)

Two of the nine tracts of land reserved by the Indians in Article Third explicitly include fishing grounds and small islands adjacent thereto—the reserve on Whitefish Bay and two tracts of land between Point-au-Barbe and the Mille Coquin River on the north shore of Lake Michigan near the Straits of Mackinac. Dr. Tanner testified that this explicit reference to fishing grounds underscored the importance of these fishing areas to the Indians. (Tr. 237.)

Regarding the Lake Michigan fishing grounds, there had been a controversy in 1832 resulting from an attempt by two white traders, Edward Biddle and John Drew, to gain exclusive rights to fish there. (*See* Ex. P-21 and P-21A; Tr. 238.) The Indians were angry because Messrs. Biddle and Drew were dealing with a spurious chief and represented to the United States that the Indians would not object to the grant to them of an exclusive right to fish in this highly prized area. Some fourteen canoes filled with Indians came to Mackinac

to protest. They were angry that Biddle and Drew claimed they had an exclusive right to fish in this area because Nabanoi, the spurious chief, did not have the authority to confer such a right on anyone:

> [T]he Indians were fully aware that the traders were to blame, making the application and trusted that their Great Father would not allow this to take place.

(Ex. P-23, 23A; Tr. 241; *see also* Ex. P-25, 25A, 27, 27A.)

A similar conflict arose in Whitefish Bay when Messrs. Ashmon and Abbott requested a permit to fish there in 1835. They too were refused such a permit. (Ex. P-37, 37A.) This incident explains why the fishing grounds at Whitefish Bay were mentioned explicitly and included within the land reserved there. (Tr. 245.)

Specific fishing grounds were not explicitly mentioned adjacent to the other Articles Second and Third reserve because there were no similar controversies with traders in these other locations. But the location of all these reserves reflected the Indians' choice or preference and their dependence on fishing. (Tr. 246.) Dr. Tanner stated:

> I think I remarked earlier that all of these reserved areas are adjacent to or have access to very well-recognized fishing grounds, areas that I referred to this morning as being reported as good fishing grounds by Strang and Baraga and other people later on in the 19th century.

(Tr. 246.)

The record discloses, therefore, that the United States was willing to give the Indians exclusive fishing rights in both locations where the Indians were aware that the white men were likely to fish competi-

tively. The United States made no provision to secure the Indians' fishing rights in any other areas, even though it was aware that white men wanted the right to fish and it was represented by traders who were parties to the original conflicts over fishing rights. It is likely that this negotiation gave the Indians the impression, and was intended by the United States to give them the impression, that the United States did not seek the fishing rights of the Indians. The United States was apparently unconcerned about whether it acquired these rights from the Indians.[16]

The United States knew how to put specific language limiting rights of hunting and fishing into an Indian treaty when it wished to secure such rights from the Indians. An example is found in the language of the Treaty with the Winnebago, signed September 15, 1832 (7 Stat. 370; Ex P-187, Article XI):

---

[16]

In addition, it should be noted that the granting language of the treaty is quite limited: "The Ottawa and Chippewa nations of Indians cede to the United States *all the tract of country within the following boundaries*: . . . ." (Emphasis supplied.) Notably absent are the words such as "all their right, title, and interest." *Cf.* Treaty of August 3, 1795, with the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Potawatimes (sic), Miamis, Eel River, Weea's Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49 (cede and relinquish forever, all their claims to the lands); Treaty of May 31, 1796 with the Seven Nations of Canada, 7 Stat. 55 (cede, release and quit claim . . . forever, all the claim, right or title . . .); Treaty of November 17, 1807, with the Ottaway, Chippeway, Wyandotte, and Pottawatamie (sic) Nations, 7 Stat, 105 (agree to cede, and forever quit claim . . . all right, title, and interest which said nations now have, or claim, or ever had, Treaty of September 8, 1823, with the Florida Tribes, 7 Stat. 224 (do cede and relinquish all claim or title which they may have . . .); Treaty of June 2, 1825, with the Great and Little Osage Tribes, 7 Stat. 240 (do cede and relinquish to the United States, all their right, title, interest, and claim, to lands . . .); Treaty of October 23, 1826, with the Miami Tribe, 7 Stat. 300 (cede to the United States all their claim to the land).

> In order to prevent misapprehensions that might disturb peace and friendship between the parties to this treaty, it is expressly understood that no band or party of Winnebagos shall reside, plant, fish, or hunt after the first of June next, on any portion of the country herein ceded to the United States.

(Tr. 2238.)

The willingness of the United States to give exclusive fishing rights in the areas prized by the Indians and the apparent lack of any concern about Indian fishing rights in other areas destroys any inference which might otherwise be derived from the fact that the area of concession included water area. It is most likely that, recognizing the Indians' dependence upon fishing, as noted above, the United States intended that the Indians rely upon their right to fish to provide for themselves while in Michigan.

Turning to Article Fourth, it provides for the payment of annuities to the Indians for a twenty-year period. It also provides for education, books, teachers and schoolhouses for the Indians for a like period. Money was provided to purchase tools, equipment, medicine, the services of a physician and tobacco. Of particular importance is the language in Article Fourth providing for ". . . one hundred barrels of salt, and five hundred fish barrels, annually, for twenty years." Dr. Tanner testified that the government provided barrels and salt so the Indians could participate in the commercial marketing of fish:

> The Indians are packing fish into barrels and salting them down, because they're transported in barrels.

(Tr. 253.)

Article Fourth also provided $150,000 to the Indians, but only after they assented to the Senate's unilateral amendment

limiting the land reserves to five years ". . . and no longer, unless the United States grant them permission to remain on said lands for a longer period." (Tr. 255.)

Article Fifth provided for the payment of the Indians' debts to traders. This, of course, ". . . is probably one of the principal interests the trading people have in the Treaty process." (Tr. 256.)

[471 F Supp 235]

Article Sixth provided for payments to the half-breed relatives of the Ottawa and Chippewa. (Tr. 256-58.) The Indians had much concern for their half-breed relations and thought of them as part of their family. (Tr. 258.)

Article Seventh provided, *inter alia*, for blacksmith shops to be maintained for the Indians. This was of particular importance to them because the blacksmiths could make and repair metal goods used by the Indians to catch fish. These goods included metal hooks, ice cutters and other fishing implements. (Tr. 260.)

Article Eighth deals with the subject of removal and will be treated in a separate section of this opinion.

Article Ninth provided for land and monies to be given to certain individuals such at Leonard Slater, John Drew, Edward Biddle, John Holiday (sic) and Henry Levake, to mention a few. Many of these persons who were singled out for special gifts under the treaty were traders who escorted the Indians to Washington, D.C. and represented the Indians at the closed door sessions when the treaty articles were actually written. (Tr. 262.)

Article Tenth provided for the payment of monies to the Chiefs. This was a common practice in treaty negotiations. Further, the Indians, as a part of their culture and traditions, expected to exchange gifts after an important agreement like a treaty was negotiated. (Tr. 263.)

Article Eleventh provided for small annuities to two aged and infirm, but highly respected, old chiefs. (Tr. 263.)

In Article Twelfth the United States agreed to pay the expenses the Indians incurred traveling from their homes to Washington (and back) in order to participate in the treaty making process.

Article Thirteenth, an extremely important section of the treaty, provides:

> The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

Dr. Tanner testified that "the usual privileges of occupancy can be interpreted to mean living in the way that the Indian people have always been in the habit of living." (Tr. 264.)

> I think that this particular type of a provision was of considerable importance to Indian people. It usually winds up a treaty and is given as kind of assurance to them that they can continue to live in the manner that they have been accustomed to, and have no fear that their life will be disrupted.

(Tr. 265.) Further, Dr. Tanner testified that the term "usual privileges of occupancy" includes the use of all natural resources for economic and ceremonial purposes and for travel. (Tr. 265.) It includes hunting, fishing, gathering berries, collecting grains, gathering rush for mats and the like. (Tr. 266.)

Dr. Clifton's testimony corroborates Dr. Tanner's on the meaning of the term "usual privileges of occupancy." The Indians could ". . . make use of natural resources as they were accustomed to doing or had been doing." (Tr. 2278.)

Article Thirteenth was extremely important to the Indians for several reasons. (Tr. 274; *see also* Ex. P-44, 44A.) First, as previously stated, it was explained to the Indians to mean that their usual way of life would not change after the treaty was consummated:

> [Article Thirteenth] was to indicate and reassure Indian people that they could continue living the way they had been living.

(Tr. 278.)

Second, the Indians were very reluctant to cede all of their land and water. Some wanted to convey only small parcels to the United States. However, the United States wanted an extensive cession, and got what it wanted by use of "any means." In a letter dated February 27, 1837, from Schoolcraft to his superior in Washington, the Indians' reluctance to enter into a large cession is discussed. (D. Ex. 32 and 32A.) The United States wanted to extinguish as much Indian title as possible. Treaty negotiations were time consuming and costly. The United States knew that the price they

[471 F Supp 236]

would pay for cessions in the future would be increasing over time. Article Thirteenth, therefore, was used to persuade the Indians to cede much of their Michigan land and waters on the theory that so long as the Indians were allowed to use all of the natural resources of the land and water, a large cession would not adversely affect them. (Tr. 270.)

Furthermore, Schoolcraft stated (State Ex. 32A) that not only did he explain that Article Thirteenth would allow the Indians to continue to use all of the land and water resources of the ceded area, but that since much of the ceded land was uninviting to agriculturalists, it would not be settled and the Indians could use the resources of this land *indefinitely.* Several months earlier, in July 1836, Schoolcraft wrote a letter to Lewis Cass over the Indians' assent to the unilateral Senate amendment limiting their land reserves to five years unless the United States allowed them to remain longer and said that the reasons the Indians agreed to this change was because of:

> . . . the practical operation of the provision contained in the 13th article of the treaty, *which seemed to them indefinitely the right of hunting on the lands ceded,* with the other usual privileges of occupancy until the land is required for settlement.

(Ex. P-18A, p. 2; emphasis supplied.) *See also* Tr. 275.

Dr. Clifton testified concerning the Indians' understanding of the term "until the land is required for settlement" and how that concept might have been explained to them.[17] He said:

> I would emphasize that that specifies not a date, not a season of the year, but a condition which is coming. And it is coming—it came gradually, obviously, over the course of a long, a large number of years. And it is very ambiguous as to any idea by terminal point when that condition might end.

* * * * * *

[17]

Dr. Clifton has a background in the field of descriptive linguistics and is familiar with languages spoken by the Ottawa, Chippewa and Potawatomi.

> There will also be probably some land that is not occupied and not used and unsettled.

(Tr. 2278-79.)

With regard to the use of the term "indefinitely," which Schoolcraft used to explain to the Indians how long their usual privileges of occupancy might last, Dr. Clifton testified:

> Now I don't know that there is any such phrasing as "indefinitely" in either of these dialects of the language that the people spoke. I doubt that there is anything like it, just as we would not anticipate to find much other correspondence between the vocabulary of English and the vocabulary of this language. The languages were constructed on very different principles, so I wouldn't think that the Chippewa—the interpreter would be able to reach for in his head and get an equivalent . . . He might wind up saying something like "a very, very, very long time, many winters, or many, many seasons," or something to this effect, conveying the idea that it was a long period of time.

(Tr. 2283.)

Even though Article Thirteenth reserved the right in the Indians to hunt, fish, gather fruits of the land and use all land and water resources, it also contains words of limitation—". . . until the land is required for settlement." Dr. Tanner testified this meant to the Indians that they could use all ceded land unless particular parcels were occupied by non-Indian settlers:

> Q: [By Mr. Greene] Well, now when might—assuming for the moment that the language of Article Thirteenth would have some impact on the Indians in terms of their right to continue to use certain lands, when do you suppose that impact would occur? How does this Article

Thirteenth—how is it going to limit, if at all, the activities of the Indian?

A: [By Dr. Tanner] Well, I think from taking the statements that we have, that

[471 F Supp 237]

are translations from the Indian people themselves, it would be until the lands were occupied, until there appeared to be some population pressure that would indicate a need for that land. And all in all, I would say that some significant population density would have to be achieved throughout the ceded area before it would become apparent to Indian people that their lands were needed or they were required for use by any other people.

• • • • • •

Indian people, as you know, are accommodating people, and if their life was not interfered with, they would probably not undertake to make an objection. I think that the only general statement that I could make, Mr. Greene, is the one that I have made, that there would have to be some apparent density population for the need to use the land before there was any requirement to take up the land.

(Tr. 275-76.)

Dr. Clifton's testimony on this subject was similar to Dr. Tanner's. He stated:

They would see—the Chippewa—I will say this on general terms—all of the Indians in the Great Lakes area saw land, and what was ever on the land, or streams, what was ever in the streams, that were not occupied and used by someone else, as open to their use.

> And this is a very ancient way of thinking, not easily and quickly changed by any such document as this.

(Tr. 2285.)

Article Thirteenth was paraphrased in a variety of ways before the treaty was negotiated, always in the context of hunting or occupying the land:

"the right to hunt and live on the tract, until it is required," Henry Schoolcraft, September 23, 1835 (Ex. P-41).

"a defined right of hunting on the lands sold," Henry Schoolcraft, November 3, 1835 (D. Ex. 12).

"a full right to hunt on the ceded lands, as long as they are unoccupied," William Johnston (Ex. P-43), and John Clitz (Ex. P-44), both on November 17, 1835.

"the privilege of hunting upon the land, and of residing upon it, until it is surveyed and sold by the government," Agreement of the Ottawa and Chippewa chiefs to cede lands, December 29, 1835 (D. Ex. 290).

"the usual privileges of residing and hunting on the lands sold till they are wanted," Henry Schoolcraft, treaty minutes, March 15, 1836 (Ex. P-17).

After the treaty was signed, Henry Schoolcraft paraphrased and explained the provision in similar fashion:

"the right to live on and occupy any portion of the lands until it is actually required for settlement," Memoirs . . ., March 28, 1836 (D. Ex. 304, p. 534);

"I employed the term 'settlement' in its ordinary meaning to denote the act or state of being settled," letter of February 27, 1837 (D. Ex. 32; Tr. 266).

"While [the lands] remain the property of the United States," letter of February 27, 1837 (D. Ex. 33);

"the conditional usufructuary right," Report for 1837 (Ex. P-62, p. 3).

The phrase "until the land is needed for settlement" is ambiguous as to the term of Indian occupation. It was explained to the Indians as indicating a very, very, very long time in the future. (Tr. 2278-84; D. Ex. 32.) Many of the Indians of the treaty region lacked any experience base with which to understand even the "ordinary meaning" of settlement invoked by Schoolcraft. (Tr. 2417.) In using this phrase and explaining it as they did, the treaty negotiators placed any understanding of the term of Indian occupancy beyond the comprehension of the Indians, whose sense of time was significantly different from that of white Europeans. The Indians lived in a "continuous present." The assurances given the Indians that settlement would not take place for a "very long time," an "indefinite time," and other phrases equally beyond the comprehension of the Indians, were successful in conveying an extended period of time to the extent that they placed the time of the ultimate devolution (if any) of the land,

[471 F Supp 238]

a condition sought by the United States, beyond the time frame within which the Indians could understand human affairs. Since they lived in a continuous present, any such time period related to events beyond their continuous present, which, to them, would never occur. I find this to be a fact. Accordingly, the Indians understood that they would go on hunting and fishing for as long as any Indians lived in Michigan. (Tr. 51-58, 535-7, 542-58, 2281-94, 2482-89.) According to the Indian understanding, Michigan Indians could hunt and fish "as long as the sun rose and the waters flowed."

The United States only intended to impose a time limitation upon Indian usufructuary rights with regard to Indian use of unreserved ceded land. The United States intended to provide for settlement, an occurrence which it always expressed as happening upon the land. Article Thirteenth was designed to regulate peaceably the potential conflict between the Indians and settlers in land use. (Tr. 269-70, 274.) In the minds and comprehension of the Indians, so long as any Indians resided in Michigan, their aboriginal fishing rights would be continuing and undiminished in vitality, whatever might happen to their use of unreserved land. (Tr. 276-78.)

The Indians were incapable of understanding sale or cession of lands as understood by white Americans. They understood the treaty as a gift exchange. They would secure benefits from the United States in return for some interests in land. From the Indians' only understanding of land use, stewardship, they conceived of their gift as some particular use of the products of land, for they could not conceive of giving everything on the land. Here it is not possible to determine what particular use or uses they thought were granted to the United States because of the limited treaty minutes and the very general treaty language. In other treaties such general language hid the fact that the United States had asked the Indians for only their tops of pine trees, giving the Indians in that negotiation the impression that the oaks remained theirs. Here we do not know what the United States told the Indians they wanted. Upon giving of their gift the Indians would understand that the United States received the Indian's land to care for it. Such a view was expressed by the Chief Pabanmitabi of L'Arbre Croche when discussing the right of the United States to cut wood on Indian land under the terms of the Treaty of Greenville: "If any wood is cut upon our land hereafter, we should be paid for it, and we authorize you to take care of our land." (Ex. P-30.)

In the 1836 treaty, the Ottawa and Chippewa understood that they could continue to use the land to the extent necessary to continue to live their former lives. The Indians were accustomed to accommodating settlers on their land, and the treaty obligation to accommodate them was seen as consistent with the Indians' continuing to live their lives of hunting and fishing as before. The Indians did not understand that they would have to accommodate in the exercise of their fishing right because of the concessions given them during the negotiation. (Tr. 51-58, 535-37, 542-44, 556-58, 2281-94, 2482-89.)

The 1836 Treaty did not describe the Indians' reserved fishing right as a reservation of use upon a condition subsequent, nor did the Indians have any comprehension of such a legal estate. *United States v. Shoshone Tribe*, 304 U.S. 111, 116, 58 S.Ct. 794, 82 L.Ed. 1213 (1938); *Whitefoot v. United States*, 293 F.2d 658, 667, n. 15, 155 Ct.Cl. 127 (1961), *cert. denied*, 369 U.S. 818, 82 S.Ct. 629, 7 L.Ed.2d 784 (1962).

E. *The "Removal Policy" and the 1836 Treaty.*

The concept of removal, causing the migration of Indians from eastern sections of the country to the territory west of the Mississippi, has been traced by historians to Thomas Jefferson, in approximately 1803. Based on previous commitments by the federal government to assist the original colonies to extinguish Indian title within their boundaries, Jefferson as President felt obligated to some affirmative action. His ef-

fort resulted in a draft proposal to amend the Constitution creating an Indian territory in the West and officially establishing removal as a national policy. The amendment never went beyond the draft stage and although removal did not become officially authorized until the passage of the Removal Act of 1830 (4 Stat. 411), it was an item for treaty negotiation

where circumstances demanded. (Tr. 2120-24.) In addition to pressure from expanding white settlement, other stated rationalizations for removal were the need for separate Indians from the evil influences of white society and also for purposes of national security in case of war. (Tr. 2133-38.) Such policy reasons for removal varied according to the region of the country involved. Population pressures were an important reason, i.e., settlers coming into an uninhabited or sparsely inhabited area and beginning to farm the land. (Tr. 2128-29.) In the southern states, the Indian societies were powerful, adept at picking up white men's civilized ways, and therefore constituted a threat to the whites living in the area who wished to exploit the Indians and their land. Removal was seized upon as the means to rid white settlements of these advanced Indian societies. (Tr. 2128-30.)

In the Northwest Territories, the fact that some of the Indians had previously allied themselves with the British meant that removal of these Indians from the borders would make the border with Canada more secure militarily for the United States. (Tr. 2132-34.)

Land speculation was also a factor in fueling both the removal of Indians and the subsequent population growth of a ceded area. One form of this speculation involved the United States buying land cheaply from the Indians, and then selling it at a substantially greater price to white settlers and speculators in order to finance treaty provisions, and to raise general funds. (Tr. 2134-36.) The true motive for the majority of whites was economic gain through exploitation of the Indian. (Tr. 2137-41.)

Although removal was to be a voluntary act on the part of the Indians, both before and after the Removal Act, there were instances of forced removal. Andrew Jackson, President from 1829 through 1837, made requests which were actually

orders and was responsible for a forced removal involving the Cherokee and Creek. (Tr. 2138-43.) Jackson went so far as to defy a decision of the United States Supreme Court, *Worcester* v. *Georgia*, 31 U.S. (6 Pet. 515, 8 L.Ed. 483 (1832). (Tr. 2151-52.) The Removal Act of 1830 specifically provided that removal was to be allowed for "such tribes or nations of Indians *as may choose* to exchange the lands where they now reside and remove there" ("there" being territory belonging to the United States west of the Mississippi River). (Emphasis supplied.) There was opposition to the passage of the Removal Act and by 1838 the removal pressure eased substantially. However, some removals did take place during the early 1840's. (Tr. 2153, 2372-73, 2446; D. Ex. 310.) Not every treaty negotiated with eastern tribes in the 1830's obligated the tribe to remove; in fact, most of the treaties of that decade did not do so. Pressure for removal varied considerably depending upon a tribe's location. Generally, removal pressure was strongest in the southeast and weakest in northen Michigan and Wisconsin. (Tr. 227-28, 504-06, 2128-32, 2143, 2159-62, 2273-74.)

For analytic purposes the treaties of the 1830's may be classified in three broad categories, depending upon the degree to which they do or do not call for removal of the Indians involved:

(a) Land base reduction treaties. These treaties involve a cession of part of a tribe's land base, generally with retention of reservations in common of unlimited duration. The consideration for the cession is usually payable on or near the reservations. No mention is made of lands in the west or of removal. These treaties are not removal treaties. (Tr. 2162-81; Ex. P-178, 179, 180, 181.)

(b) Permissive removal treaties. These treaties generally follow the provisions of the Removal Act. (State Ex. 310.) They incorporate land base reduction features,

[471 F Supp 240]

but in addition provide for the possibility of the Indians removing west if they desire to do so. They are generally vague on the details of and the time for removal and on the location and extent of land to be provided in the west. (Tr. 2182-99; Ex. P-182, 183, 184.)

(c) Obligatory removal treaties. These treaties use language obligating the tribes to remove, and generally involve a cession of all tribal lands east of the Mississippi. Often specifics are set forth regarding the details of the move, a deadline for removal, and the specific land in the west to which the tribe is to remove. Often payment of annuities and goods is to be made only in the west, as an inducement to removal. (Tr. 227-28, 504-06, 601-05, 2200-22, 2226-45; Ex. P-184, 185, 186, 187, 188, 189.)

With the aforestated removal concepts in mind, I turn to the situation in Michigan in 1836 and the treaty area in question. Pressure from settlers for acquisition of Indian land—an important factor which often resulted in obligatory removal treaties—was absent from all but the extreme southernmost portion of the treaty area, on the north bank of the Grand River. Even the rough geography of the treaty area was unknown at treaty time. Henry Schoolcraft did not believe in 1836 that settlers would enter the northern part of the treaty area for decades, if ever. (Tr. 209-10, 227-28, 274-75, 2273-74, 2382-94; Ex. P-125, 133; State Ex. 32, 63, 251, 311.) The 1836 treaty did coincide with pressures to make Michigan a state. Because of this, there was probably reason to acquire the ceded portions in order to make the prospects of statehood more attractive in terms of territory available for settlement, industry, etc. (Tr. 2265-66.)

There is no mention of removal in the letters to the treaty delegates, treaty minutes, the treaty instructions, or in any of the other correspondence before the treaty. The first mention of the possibility of removal is found in the treaty itself, in which the original version of Article Eighth provided:

> It is agreed, that as soon as the said Indians desire it, a deputation shall be sent to the west of the Mississippi, and to the country between Lake Superior and the Mississippi, and a suitable location shall be provided for them, among the Chippewas, if they desire it, and it can be purchased on reasonable terms, and if not, then in some portion of the country west of the Mississippi, which is at the disposal of the United States. * * * When the Indians wish it, the United States will remove them, at their expense. . . .

(Tr. 205-06, 219-22, 504-06; Ex. P-15.)

The Senate amended Article Eighth in the following material respects (amended language underlined):

> It is agreed, that as soon as the said Indians desire it, a deputation shall be sent *to the southwest of the Missouri River, there to select a suitable place for the final settlement of said Indians, which country, so selected and of reasonable extent, the United States will forever guaranty and secure to said Indians.* * * When the Indians wish it, the United States will remove them, at their expense. . . .

The apparent purpose of the amendment was to eliminate the option of removal to the area among the Chippewa of northern Minnesota. (Tr. 205-06, 219-21; Ex. P-15; State Ex. 17, 304, pp. 538-39.) The Senate amendment was not introduced into the treaty for any substantive or policy reason, but, as Schoolcraft believed, to embarrass President Jackson. (Tr. 199-202, 538-39, 2267-72; D. Ex. 304.)

The Treaty of 1836 is a hybrid type of treaty, with characteristics of both a land base reduction treaty and a permissive removal treaty. At most it is a permissive removal treaty, because the provision for payment of annuities is to be in Michigan (indicating an intention to stay); the language of removal in Article Eighth—"as soon as the said Indians desire it," "[w]hen the Indians wish it"—is permissive, not obligatory; there is no preamble stating that because of population pressures the Indians must move out west (as is common in oblig-

[471 F Supp 241]

atory removal treaties); there is a cession of land with specific provisions for reservations of land for the Indians; the land reservations are held in common by the Indian tribes; there is no specific parcel of land set aside for the Indians out west; and there is no removal deadline contained in the Treaty. There is also a provision for the usage of the ceded land until some vague future time. (Tr. 203-06, 226-28, 370-71, 504-06, 509-11, 1740-44, 2245-67.)

After the Treaty of 1836 was signed, the Indians of the treaty area never had any serious intention of removing west of the Mississippi. It is inconceivable that, knowing that removal meant cruel travel hardships and leaving behind the most important single aspect of their life—fishing—the Indians would ever have agreed to remove. (Tr. 212, 831-32; Ex. P-94.)

In 1838 an exploring party under the direction of James Schoolcraft, Henry's brother, went west to examine lands on the Osage River in what is now Kansas. The Indians of the Upper Peninsula refused to participate in this exploring party. In refusing to send anyone on the exploring party, they stated we "are not aware of any obligation to go west of the Missis-

sippi." (State Ex. 92.) The purported acceptance of lands in the west signed by the exploring party accepts the land "upon which we agree to remove in the event of our emigrating." (State Ex. 99; Tr. 218.) The exploring party was not representative of the leadership of the treaty area of the Lower Peninsula. (Tr. 2316; Ex. P-190.) Just before the return of the exploring party to their homes, the members signed a document purporting to accept the land in the west that they had selected as a place for the removal of those Indians of the treaty area who wished to do so. (Tr. 205-06, 212-18, 227-28, 2300-30; Ex. P-190; State Ex. 52, 60, 62, 63, 92, 93, 94, 97, 99, 100, 252, p. 341.) The court doubts the validity of the exploring party's acceptance: The delegation expressed displeasure with the land because it contained no sugar maple trees. (Tr. 1709; D. Ex. 92, 93.) The selection of a party to determine whether the lands to which they would remove would seem to be an important decision for the tribes, and they would have undoubtedly sent their chiefs if they were serious about removing. (Tr. 2322, 2495.) There was some discrepancy even between the list of the members of the party who went out to see the land, and the list of the persons who signed the document of assent accepting the lands out west. (Tr. 2318-19; Ex. P-190.) It appears that James Schoolcraft, who was in charge of the exploring party, forced the party to sign the acceptance of the lands before the Indian representatives had an opportunity to go back to their bands and report to them. (Tr. 2324.) It is probable that the Indians who went on the expedition went for ulterior motives; they wished to stall the United States on the subject of removal; the younger Indians loved to travel, and the members of the traveling party were given rewards for going, such as blankets and guns. (Tr. 2323, 2496.)

At a general council of Indians at Michilimackinac after the return of the exploring party, the Indians opposed removal

but accepted the lands in the west for whomever "may personally agree to remove." (D. Ex. 62.)

Neither the federal government nor the Indians took any further steps toward removal. The removal of the Indians of the treaty area was tacitly abandoned soon after the return of the exploring party, and was officially abandoned in the Treaty of 1855. No Indian from the treaty area ever removed west of the Mississippi River. (Tr. 205-06, 227-28, 282-84, 289-91, 301-03, 509-11, 2158; Ex. P-65, 80, 89; D. Ex. 63, 251, p. 345, 352, p. 341.) Nor did the Indians change their lifestyle as a result of the Treaty. (Tr. 218, 620-21, 1450-52, 1697-99, 1710-13.)

In summary, although the 1836 treaty was negotiated during the Removal Period and was not in conflict with the provisions of the Removal Act of 1830, by its terms it was permissive as to removal from the area ceded. Since it was permissive and since removal from the treaty area never took

[471 F Supp 242]

place, the classification of the treaty as a removal treaty has no bearing or relevance to the issues here in question.

F. *1836 to 1855.*

From the Indians' perspective, the period between the two treaties was marked by dissatisfaction with the government's implementation of the earlier treaty and confusion regarding the status of the Articles Second and Third land reserves. (Tr. 282.) The Indians of the treaty area were given tacit permission by the federal government to remain on the reservations beyond the five-year period—the reservations were withheld from sale and continued in existence until another provision was made in the Treaty of 1855. (Tr. 230-3

282-84, 301-03; Ex. P-65, 89.) Nonetheless, the insertion of the Senate amendment regarding the longevity of the Articles Second and Third reserves created apprehension and uncertainty in the minds of Indians and non-Indians alike. (Tr. 284). One way the Indians attempted to cope with this uncertainty was to buy land in fee. The missionaries encouraged these purchases and some Indians used annuity money from the 1836 treaty to buy land. (Tr. 285.)

In the Sault Ste. Marie area, there was a local problem related to the destruction of the important fishing site and encampment at the St. Mary's rapids caused by the construction of the canal and locks here. (Tr. 285.) Construction began in 1853 and displaced those Indians permanently encamped there. (Tr. 285; *see also* Ex. P-81, 81A.) The canal and locks were completed and opened to traffic in 1855, about one month before the Treaty of August 2, 1855 was negotiated. (Tr. 287.)

In 1853, Henry C. Gilbert, the Michigan Indian agent, wrote to his superior, George Manypenny, Commissioner of Indian Affairs (Ex. P-80, 80A), and stated that the Ottawa and Chippewa would never consent to removal and it would be difficult to forcibly remove them because they ". . . are divided into so many independent bands, and are scattered from one extremity of the state to the other." Gilbert's recommendation was to allow the Indians to remain in Michigan, set aside land reserves for their benefit and convey parcels to individuals in fee ". . . as they become sufficiently enlightened to be capable of taking charge of themselves." Gilbert also said that the residents of the state would not object to the Indians remaining there. (Tr. 291.) Shortly thereafter, in March 1854, Gilbert again wrote to his superior expressing his views on the policy the government should adopt to permanently benefit the Ottawa and Chippewa of Michigan. (Ex. P-82, 82A.) In that communication, Gilbert listed several

claims the Indians had under the 1836 treaty. He advocated that certain tracts of land, far removed from the whites, be set aside for the Indians and be subject to restraints on alienation which subsequently could be removed whenever it was deemed expedient.

The Indians' dissatisfaction with the implementation of the 1836 treaty is reflected in part by a message prepared by a delegation of Ottawa and Chippewa who visited Washington, D.C. in February 1855. (Ex. P-87, 87A.) At that same time, this delegation sent another letter to the Commissioner of Indian Affairs inquiring about certain promises of goods and services under the 1836 treaty and asking whether those promises had been carried out. (Ex. P-86, 86A.)

In May 1855, the Commissioner of Indian Affairs wrote to his superior, the Secretary of the Interior, and said:

> Firstly, as regards the Ottawas and Chippewas in the State of Michigan, that I am of the opinion that an officer or officers of this department should be designated by the President to negotiate with the Indians with a view of adjusting all matters now in an unsettled condition, and making proper arrangements for their permanent residence in that state.
>
> • • • • • •
>
> It was anticipated that after a few years, these Indians would remove southwest of the Mississippi. Hence the provision of a home for them there, as per article 8 of the treaty and the Senate's amendment thereto; ***but they were not limited by the***

[471 F Supp 243]

treaty to any time within which they should remove to avail of the homes thus promised.

They have never emigrated west, but have continued to hold the reservations described in the 2d and 3d articles of the treaty—which have accordingly been withheld from sale to accommodate the Indians.

Measures should now be taken, in my judgment, to secure permanent homes to the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts.

• • • • • •

It may also be considered of some value to the United States to have the Indians relinquish their right to a home west of the Mississippi, although in my judgment, it would not be unjust to deny them the benefit of that right, *as they have not heretofore, nor it is to be supposed they will hereafter, avail themselves of it.* The amount that should be allowed them for its relinquishment, ought not, in my opinion, to exceed the value of lands they might receive for homes in Michigan. (Emphasis supplied.)

(Ex. P-89A, pp. 1-2; *see also* T. 301-03.)

In summary, then, the 1855 treaty was negotiated to address two principal issues: first, the provision of permanent homes for the Ottawa and Chippewa in Michigan; and second, the settlement and consolidation of monies and services owed to the Indians under previous treaties and in particular the Treaty of March 28, 1836. (Tr. 295-97.)

G. *Meaning of the Treaty of July 31, 1855.*

Article 1 of the Treaty of July 31, 1855 (11 Stat. 621) designated certain land to be withdrawn from sale from which the Indians were to select homesites. (Tr. 304.) Tracts were withdrawn for particular bands and are depicted on [Ex. P-129C] a map and overlay prepared to illustrate Dr. Tanner's testimony. From these withdrawals, band members were to select 80 acres if they were the head of a household and 40 acres if single. (Tr. 306.) After the land was selected, it was not to be alienable for a period of at least ten years after which the restriction on alienation, in certain circumstances, could be removed. (Tr. 307.) The procedure set forth in Article 1, however, was rarely followed, and many Indians never received an allotment, notwithstanding the treaty provisions requiring the same. (Tr. 307.)

These promises proved to be as ethereal to the Indians as the promises which they replaced. The Indians relied upon them to their detriment as they had on the promises before.

The land reserves under the 1855 treaty correspond, for the most part, with the land reserves provided for under the 1836 treaty. (Tr. 312.) Dr. Tanner testified that the land reserved under the 1855 treaty redefined the 1836 land reserves. (Tr. 312.)

Article 2 provided for the delivery of certain goods and services to the Indians, including monies for education, agricultural and carpentry tools, cattle, household furniture and the like. The Indians were also to receive annuities (paid over a fourteen-year period), and the services of blacksmiths.

Article 3 of the treaty provided:

> ARTICLE 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all lia-

> bility on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however, the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820.

(11 Stat. 624.) This release clause categorizes the Indians' claims into legal and equi-

[471 F Supp 244]

table. The legal claims of the Indians pertained to certain goods, services and annuities promised to them under the 1836 treaty, but which were never delivered. (Tr. 319.) Equitable claims, by contrast, related to removal (Article Eighth of the Treaty of 1836) which was never implemented. (Tr. 320.)

Plaintiffs' Ex. P-19 and P-19A are the treaty minutes, which is a long and comprehensive document. In that document are examples of those claims the treaty commissioners considered to be legal, as opposed to equitable. Before considering those claims, the purpose of the treaty was made clear by Commissioner Manypenney early in the proceedings:

> *Com. Meanypeny* [sic]. There were two delegations of Ottawas and Chippewas at Washington last winter, each making nearly the same inquiries concerning the affairs of their people. They each had the impression that there was unsettled business under the older treaties running back as far as 1795. . . . The examination I made led me to the conclusion that there was little foundation for

> many of the claims the delegates made, while they were at Washington. I directed the acting Commissioner, when I left Washington from which place I have been absent four or five weeks, to examine & if he found any default in the fulfillment of the old treaties by Government, to advise me of it. The fact in relation to your business, accords with the fair presumption, because it is a fair presumption, that when the Treaty of 1836 was made all questions, growing out of previous treaties, of an unsettled character, were adjusted. With this general remark I now say, that notwithstanding this fair presumption, if it shall appear that there is still any thing actually due to you under the old treaties, you may rely upon my efforts to obtain it for you.

(Ex. P-19A, pp. 10-11.)

Examples of legal claims the Indians had for promises made by the United States included the following: The Indians inquired about whether annunities promised under the 1836 treaty were paid. They wanted to know if the money for agricultural implements, school houses and books, medicines and vaccines, and annuities for half-breeds, had been paid. (Tr. 294-97, 318-21, 323-24; Ex. P-19, pp. 14, 17-22, 27-28, 52.)

Contrasting with these "legal" claims are those the treaty commissioners referred to as "equitable:"

> *As-sa-gon.* At the treaty of 36—in ceding lands there was a provision made for lands to Indians, who wished to remove West of the Mississippi. A year of two after a delegation of the tribes went West of that river & were told the land on which they stood was theirs. What is to be done with that land?

Heamlin Intpt.

Com. Meanypeny [sic]. The Indians never having removed they hold not land West of the Mississippi. The question however, is of an equitable character & will be considered.

Heamlin Intpt.

Agt. Gilbert—explains that the treaty simply provides for a suitable home west of the Mississippi, if they desire to go there.

Heamlin Intpt.

As-sa-gon. We next wish to call your attention to where the government, in the Treaty of 1836, provides that it will remove the Indians. We wish to claim the amount of the expense of removal, out-fit & one years subsistence.

Heamlin Intpt.

Com. Meanypeny [*sic*] As I remarked to you yesterday events that have not taken place & are consequently dependent upon contingencies that have never transpired. We may regard them equitable; but legally & strictly the Indians have no rights under them.

(Ex. P-19A, pp. 22-23.)

Com. Meanypeny [*sic*]. As I remarked to you yesterday you have no legal right to the lands West of the Mississippi unless

[471 F Supp 245]

you remove. Your rights, while you remain here are entirely equitable in their nature. Having determined that you will not remove it is now a question how you will settle your affairs here. It is vain to request money for those lands. We will not give it. It cannot listen to it.

(Ex. P-19A, p. 32.)

> *Com. Meanypeny* [sic]. . . . I do not understand that the Indians have any right under the treaty to commutation for the expense of removal, subsistence & outfit. That was in consideration of your removal. It was no part of the price of your land. I feel inclined, however, to be liberal with you in the adjustment of these equitable matters.

(Ex. P-19A, p. 47.)

> *Waw-be-geeg* . . . You promised if you took me West of the Mississippi to give me lands, outfit and subsistence for a year. The land West of the Mississippi is better than the land here. You have kept a large amount of money in your pocket by not removing us. We wish you to give us what is equitable.
>
> *John Johnston, Intpt.*
>
> *Com. Meanypeny* [sic]. I admire the ingenuity of Waw-be-geeg & I doubt not that this speech will impress our minds. I wish it understood though that the government is not *indebted* to the Ottawas and Chippewas for that removal and subsistence matter. It is time we saved some money by not removing you, but it was not yours but the government's money that we saved. *We have been ready to remove you. You thought it best to stay & you were right. We think we may say in view of the equities of the subject that we will allow some sum in commutation* . . . . (Emphasis supplied.)

(Ex. P-19, p. 43.)

In summary, "equitable" claims the Indians had against the United States arose from Article Eighth (removal) of the 1836 treaty. (Tr. 323-34.) "Legal" claims of the Indians related to specific sums of money the United States had explicitly promised to pay under the 1836 treaty, but had not in fact been delivered to the Indians. The Indians were asking for an

accounting from the United States. (Tr. 323.) They wanted to be certain the lengthy list of monies earmarked for particular purposes had in fact been expended as promised.

Dr. Tanner testified that a review of the 1855 treaty minutes (Ex. P-19, 19A), reveals no mention whatever of fishing or fishing rights. (Tr. 326.) She also testified Article 3 had no impact whatsoever on the fishing rights the Indians reserved under the earlier treaty of 1836. (Tr. 326.) Further, Dr. Tanner could discern nothing from the body of correspondence she reviewed or from any other source which would lead her to believe that Commissioners Gilbert and Manypenny thought that Article 3 of the 1855 treaty had any impact on Indian fishing. (Tr. 327.) The only mention of fishing in the treaty relates to the St. Mary's rapids; however, at the time of the 1855 treaty, this important fishery had been destroyed due to the construction of the canal and docks.

A. [By Dr. Tanner] This [the 1855 treaty] is an accounting Treaty. They are trying to consolidate the debts of the Government to the Indian people, what Indian people are owed. They are interested in money and in getting permanent homes, and the Sault bands, of course, are interested in getting money for their fishery that has been damaged, but there isn't any other discussion about fishing at all.

Q: [By Mr. Greene] Is that a reference to the last portion of Article 3 of the 1855 Treaty?

A: Yes, that is the only claim. The damage claim of the Sault bands, . . . but that is the only item that is not handled by the terms of the July 31, 1855 Treaty. That is the only outstanding claim.

Q: And is that the subject of another treaty?

A: Yes, that is the subject of a separate Treaty on August—

Q: When was that Treaty negotiated?

[471 F Supp 246]

A: On August 2nd.

Q: So it was two days after the July 31st Treaty?

A: Yes, two days later. It was a separate discussion.

Q: And as to the claim there, that is for the fishery that had been destroyed at the Sault Rapids, is that it?

A: Yes, that's it.

Q: And how was it destroyed?

A: By digging the canal . . . .

(Tr. 325-27.) Neither the legal nor the equitable claims released by the third article of the treaty included the Indians' *right* to fish in the waters of the Great Lakes. (Tr. 294-97, 318-24; Ex. P-19, pp. 2-5, 14, 20, 22-23, 27-28, 32, 47, 52; Ex. P-82, 87.) Only financial obligations were released. Apart from the issue of compensation for the diminishment of the fishery at the Sault rapids—itself a financial matter—the Treaty of 1855 had nothing whatever to do with fishing or the fishing rights of the Indians of the treaty area. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that fishing rights were discussed at all, or that the Indians were told that their existing fishing activities would be in any way curtailed or restricted by the treaty. (Tr. 326-28; Ex. P-19.)[18]

---

[18]

The financial claims released by Article 3 are well documented in the record. They are specifically enumerated a number of times. One key document is a letter from Henry Gilbert, the Indian Agent for Michigan, to the Commissioner of Indian Affairs, of March 6, 1854, in which he lists the claims of the Indians which should be settled in a new treaty (Ex. P-82 and 82A):

The Indians of Michigan are principally of the Chippewa tribe. There are also remaining small remnants of the Ottawas & Pottawatomies. Their business with the Government is mainly based upon the stipulation of the Treaty of Washington of March 28th, 1836. The Annuities due by this Treaty will expire with two more payments in 1855. The only remaining claims of the Indians under it upon the General Government will then be–

1. For amount withheld & invested in stocks, $1,000 per annum for 20 years. See Art. 4.–$20,000 to which sum the accrued interest should be added.

2. For amount due the Indians for limiting their reservations by Senate Amendment to Art. 4–$200,000.

3. A reasonable commutation for lands west of the Mississippi to which they would have been entitled had they removed thither & in estimating this item for expenses of removal & subsistence, all which has been saved to the United States should be taken into account.

All other Treaty stipulations for the benefit of the Michigan Indians are permanent in their nature & under them small annuities have been paid for many years. They are as follows–

1. To the Ottawas under the provisions of the Treaties of 1795–1807–1818 & 1821	$1700.00
2. To the Chippewas of Saginaw & of Swan Creek & Black River, under the Treaties of 1795, 1807 & 1819–	$2500.00
3. To the Pottawatomies under the Treaty of July 29, 1828	1587.50
4. To the Pottawatomies of Huron Treaty of Nov. 17, 1807–	400.00

The Chippewas of Saginaw have also a claim upon the government under the Treaty of Detroit of Jan. 14, 1837 & which was modified & explained by the Treaty of Flint of Dec. 20, 1837 & the Treaty of Saginaw of Jan. 23, 1838 for the proceeds of the lands ceded by that Treaty whenever the same shall be sold.

There is also an annual appropriation under Art 8 Treaty of 24th Sept. 1819 of–	2000.00

I am of the opinion that all these claims of every description may be settled and compromised with the Indians, with great benefit to them & advantageously to the United States.

In valuing the various claims against the United States for purposes of arriving at a settlement figure, agent Gilbert, who was also a treaty commissioner, made the following calculation during the negotiations (Ex. P-19 and 19A, pp. 51-52):

> *Agent Gilbert:* My Brothers I want to say a word to you. The Commissioner thinks that we can put this money matter into a shape that will enable you between now & Monday to arrive at a conclusion. I give you then the following amounts.
>
> | | |
> |---|---|
> | Reservations | $200,000 |
> | Annuity Retained | 26,000 |
> | Imprt. Fund | 50,000 |
>
> In conceding the last amount as a basis for your deliberations, if the Commissioner on his return to Washington finds the amount more or less, you will be paid accordingly. Our impression is that, that is what is due. You may further estimate the sum of $30,000 for equitable claims on the removal, outfit, & subsistence matter. You may further estimate the annuity of $1700 at $30,000 which seems to us its value. This makes in all $336,000. That is the amount the Commissioner is willing you should take as the basis of your calculations.

As a final example, the treaty commissioners explained the claims in their letter of transmittal of the treaty in the following terms (Ex. P-19 and 19a, pp. 4-5):

> "In consideration therefore of the difference in the value of the western lands, and the home now secured to the Indians in Michigan and in the release and discharge of the United States from all claims or demands on account thereof, or on account of the claims for "articles and equipments to each person" and also in discharge and full satisfaction of the $200,000 stipulated to be paid them in lieu of the reservations by the Senate's amendment to the 4th Article of the treaty of 1836, and in like discharge of the sum which has accumulated from the investment of the $1,000 per annum, provided for by the 4th Article of the treaty aforesaid, and in discharge of the $1,700 permanent annuity due to the Ottawas and heretofore specifically alluded to; in fact, in lieu and satisfaction of all claims, legal or equitable, on the part of said Indians jointly and severally against the United States for land, money or other things guaranteed to them by the stipulations of any former treaty or treaties (excepting the rights of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the treaty of June 16, 1820)

[471 F Supp 247]

The treaty had no impact on any fishing rights the Indians might have had prior to the 1855 treaty.

It is probable that the Indians at these treaty negotiations did not understand such legal terms as "legal and equitable," "satisfaction of claims," and "release and discharge." (Tr. 1482-84, 1490-91.)

Article 5 of the 1855 treaty provides:

> ARTICLE 5. The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully

---

the United States are to pay to them or expend for their benefit, the sum of $538,400 in manner following, viz: . . . ."

Thus, even though on several occasions the legal and equitable claims released by Article 3 were carefully enumerated, there is not the slightest hint that the fishing right was included. Aside from the issue of compensation for the impairment of the reservation and fishery at the Sault rapids, dealt with separately in the Treaty of August 2, 1855 (11 Stat. 631)—which was itself a financial matter —the Treaty of 1855 had nothing whatever to do with the fishing rights of the Indians of the treaty area. There is nothing in the treaty minutes or other documents to indicate that fishing rights were discussed at all, or that the Indians were told that their existing fishing activities would be in any way curtailed or restricted by the treaty. (Tr. 326-28.)

> and conclusively, and with the same effect in every respect, as if all were represented. (11 Stat. 624.)

Article 5 must be understood in the context of the Treaty of 1836 and the culture of the Indians of the treaty area. The Treaty of 1836 was formally entered into by an entity called "the Ottawa and Chippewa nation of Indians." However, neither the Ottawa nor the Chippewa was politically organized at the tribal level. The primary unit of political and economic organization was the band, a more localized entity frequently associated with a village. From both a cultural and a political perspective, there never was such an entity as the Ottawa and Chippewa nation—it was put together by the federal government for the purpose of obtaining a cession in 1836. (Tr. 100-02, 772-76, 779-81.)

After the Treaty of 1836, however, this artificial entity had an existence at least to the extent that there were problems regarding implementation of the Treaty of 1836. The federal government in 1855 wished to put an end to the myriad finan-

[471 F Supp 248]

cial problems which had arisen. A new treaty also was a good opportunity to put an end to the "Ottawa and Chippewa nation." The Indian problems of the era were of a localized and specific, rather than a broad and general nature, and dealing with these problems with the large artificial group was costly, time-consuming and unwieldy. By means of Article 5, the federal government was able in the future to deal with the tribes, bands or communities of the treaty area more cheaply, efficiently and effectively on matters of local concern. There was no change in the way in which the Indians of the treaty area functioned politically or in the way in which they were dealt with by the federal Indian agents after the treaty, save one; they were never again convened or dealt

with as one entity—not even to assent to the Senate amendments to the treaty. (Tr. 331-35, 779-81; Ex. P-19.)

The Indians of the treaty area also had strong reasons for wanting Article 5. Though they were closely related, the Ottawa and the Chippewa were never happy at being lumped together as one entity. Megis Ininne, an Ottawa chief from the Grand River, complained of the inclusion of the Chippewa in the Treaty of 1836 during the negotiation of that treaty. (Ex. P-17 and 17A, p. 9.) The same objection was raised in the negotiations in 1855, this time by Waw-be-geeg, a Chippewa chief from the Upper Peninsula:

> At the Treaty of 36, our fathers were in partnership with the Ottawas, but now the partnership is finished and we who come from the foot of Lake Superior wish to do our business for ourselves.

(Ex. P-19 and 19A, p. 33.) This concern was reported by Waw-be-geeg near the end of the negotiations and was met by Commissioner Manypenny, who explained the effect of Article 5 during this exchange:

> *Waw-be-geeg.* • • • I told you when I first came that I wanted to be separated from the Ottawas and you have not answered me. We have sat here and heard you talk to the Ottawas—while you paid no attention to us.
>
> *Com. Meanypenny* [sic]. • • • The very case you suggested is met in the treaty—you are separated as you desire. This treaty you and the Ottawas must sign together is because the old treaty of 36 was made in that way, but here we have followed your suggestion and provide . . . that no general council shall be called.

(Ex. P-19 and 19A, p. 69.) Thus, the Indians, like the federal government, sought and obtained in Article 5 an end to the artificially constructed "Ottawa and Chippewa nation." (Tr. 331-35.)

H. *Tribal Fishing Regulation.*

The Sault Ste. Marie Tribe of Chippewa Indians regulates the fishing of its members in the waters of the Great Lakes within the treaty area and requires its members who fish commercially to have a tribal fishing license and a treaty fishing identification card issued by the United States Department of the Interior pursuant to 25 C.F.R. part 256. The tribe enacts its own fishing rules and regulations subject to the review of the Secretary of the Interior, imposes and collects a license fee, imposes restrictions on time, manner and place of taking, and requires its fishermen to submit catch reports. (Tr. 1139-40; Ex P-120, 165.)

The Bay Mills Indian Community regulates the fishing of its members in the waters of the Great Lakes within the treaty area and requires its members who fish commercially to have a tribal fishing license and a treaty fishing identification card issued by the United States Department of Interior pursuant to C.F.R. part 256. The tribe has a conservation code and a conservation committee which includes ex-officio members from the Michigan Department of Natural Resources and the United States Fish and Wildlife Service. The committee promulgates rules and regulations governing fishing. The tribe imposes and collects a license fee, imposes restrictions on the time, manner and place of taking, and requires its fishermen to submit catch reports. (Tr. 1080-81; Ex. P-162, 163.)

[471 F Supp 249]

Members of the tribes which are parties to this action can trace their lineage to the Ottawa and Chippewa tribes which were beneficiaries of the Treaty of Ghent and whose leaders signed the Treaties of 1836 and 1855. (Tr. 1060-61, 1064, 1128, 1179.)

V.

CONCLUSIONS OF LAW

A. *Parties.*

Ancestors and members of the plaintiff tribes have continuously exercised Indian fishing rights since the 1836 Treaty without abandonment. *Williams v. Chicago*, 242 U.S. 434, 37 S.Ct. 142, 61 L.Ed. 414 (1917). By organizing the tribes under the provisions of the Indian Reorganization Act, 25 U.S.C. § 471, *et seq.*, approving their constitutions, and issuing tribal treaty fishing identification cards to their members pursuant to 25 C.F.R. part 256, the Secretary of the Interior has recognized the plaintiff-intervenor tribes as the modern tribal successors to the Indians who were signatory to the Treaty of 1836. The Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians are Indian tribes which are political successors in interest to the Indians who were signatory to the Treaty of March 28, 1836 (7 Stat. 491). *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); *United States v. Jackson*, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930); *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 18 L.Ed. 128 (1866); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975); *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931).

B. *Canons of Treaty Construction.*

Certain axioms of treaty construction must be applied when interpreting Indian treaties to determine the extent of the rights reserved thereunder. First, the courts have held that treaties with Indians must be interpreted as the Indians would have understood them. This rule is first set forth in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581, 8 L.Ed. 483 (1832) (concurring opinion of Justice McLean).[19]

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense . . .. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Some of the reasons for this rule of construction are expressed in *Jones* v. *Meehan*, 175 U.S. 1, 10-11, 20 S.Ct. 1, 5, 44, L.Ed. 49 (1889):

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters

---

[19]

"The most celebrated opinion written by Justice John McLean of Ohio during his thirty-one years on the Supreme Court was his dissent in *Dred Scott* v. *Sanford*. [60 U.S. (19 How.) 393, 15 L.Ed. 691] His biographer states that McLean's dissent was perhaps the most important of all of the opinions in the case because it 'expressed the northern consensus on the slavery question and was eventually written into the Constitution by the Civil war and the fourteenth amendment.'" History of the Sixth Circuit, a Bicentennial Project, at 51. (Cites omitted.)

> of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the Unit-

[471 F Supp 250]

> ed States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Accord, Choctaw Nation v. *Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970); *Choctaw Nation* v. *United States*, 318 U.S. 423, 63 S.Ct. 672, 87 L.Ed. 877 (1943); *Tulee* v. *Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *Starr* v. *Long Jim*, 227 U.S. 613, 33 S.Ct. 358, 57 L.Ed. 670 (1913). And in another treaty case the Court stated:

> In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyances, but are to be construed in the sense in which naturally the Indians would understand them.

United States v. *Shoshone Tribe*, 304 U.S. 111, 116, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938).

The Court of Claims has also addressed this issue:

> The treaty was dictated by white conquerors of a subjugated race. It is inconceivable that there was the the kind of arms-length bargaining as to terms which would have made relevant as ascertainment of the Indian intention [sic]. Naturally the Indians wanted the unattainable—to be left alone. It is doubtful that the untrained Indian mind understood the ambiguities of Article III even thuogh the white representatives went to some pains to explain the provision. A great and unbridgeable void existed between the language and culture of the two races. When one considers that the meaning of Article III was sufficiently in doubt as to require the interpretative services of the Supreme Court and several lesser courts in subsequent years, one can readily forgive the Indians for any lack of perspicacity or, indeed clairvoyance.

Whitefoot v. *United States*, 293 F.2d 658, 667, fn. 15, 155 Ct.Cl. 127 (1961), *cert. denied*, 369 U.S. 818, 82 S.Ct. 629, 7 L.Ed.2d 784 (1962).

In the context of Indian fishing rights, the Supreme Court long ago rejected contentions that Indians obtained no greater rights by virtue of a treaty than non-Indian citizens:

> This [that the Indians acquired no rights but those they would have without a treaty] is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the

> right, without regard to technical rules." . . . How the treaty in question was understood may be gathered from the circumstances.

United States v. *Winans, supra* 198 U.S. at 380-81, 25 S.Ct. at 644 (citations omitted). *See also* the United States Court of Appeals' decision in *United States* v. *Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976), wherein the court stated: "In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory."

In holding that the State of Washington could not exact a fishing license fee from Indians fishing outside their reservation because of the special off-reservation fishing rights secured to them by treaty, the Supreme Court followed a similar approach. It stated:

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, *we are impressed by the strong desire the Indians had to retain*

[471 F Supp 251]

> *the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.*

Tulee v. *Washington*, 315 U.S. 681-684-85, 62 S.Ct. 862, 864, 86 L.Ed. 1115 (1942) (citations omitted). (Emphasis supplied.)

A second principle of Indian treaty construction is that doubtful expressions are to be resolved in favor of the Indian parties. *See, e. g., McClanahan* v. *Arizona Tax Com'n*, 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Carpenter* v. *Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 74 L.Ed. 478 (1930).

The rule of treaty interpretation that requires unclear phrases in treaties with Indians to be resolved in their favor was well stated in an important Indian water rights case:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the stand-point of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even of [sic] it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Winters v. *United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211-212, 52 L.2d. 340 (1908). Followed in *Arizona* v. *California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). *Accord, Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918); *Moore* v. *United States*, 157 F.2d 760, 762 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277 (1947); *Standing Rock Sioux Tribe* v. *United States*, 182 Ct.Cl. 813 (1968).

In this case, if there is any question about the meaning of any of the treaty phrases, the interpretation must be that which is most favorable to the Indians. Thus, the meaning does not depend upon today's conditions, Indian policies of the past, or what is best to effect an accommodation between non-Indians and Indians. Rather, courts are charged with the responsibility of interpreting those phrases most favorably to Indians.

Finally, the courts have prescribed that treaties should be construed liberally in favor of the Indians. The United States Supreme Court said in *Choctaw Nation of Indians* v. *United States, supra,* 318 U.S. at 431-32, 63 S.Ct. at 678:

> Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. . . . Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." (Citations omitted.)

In *Antoine* v. *Washington,* 420 U.S. 194, 95 S.Ct. 944, 954, 43 L.Ed.2d 129 (1975), Justice Douglas concurring, recalled the still-operative language of *Choate* v. *Trapp,* 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912) as expressing the general rule of construction governing contracts or agreements with Indians:

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are

> wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . ..

Accord, Tulee v. *Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938).

To adjust for the circumstances under which treaties were negotiated with Indians and to compensate for the advantage of the non-Indian parties in those negotiations, the canons of treaty construction set forth above were developed by the United States Supreme Court and other courts called upon to interpret Indian treaties. Only the clearest language depriving Indians of the rights which they had prior to the treaties will limit their rights today. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Therefore, a full understanding of Indian fishing as it existed at the time of the treaties is required to discover the meaning of the treaty in this case and the full extent of the fishing rights which were reserved by the treaty language in question.

If construction of the treaties in this light results in a meaning which seems to deprive today's non-Indians of privileges which they thought were theirs, it only points up the great injustice which has been done to treaty Indians during the many years they have been deprived of their full rights for the sake of others without rights.[20]

---

[20]

See Settler v. *Lameer*, 507 F.2d 231 (9th Cir. 1974); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957), *reh. denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683 (1965).

The rules of treaty construction which dictate such a result are the product of the circumstances in which the treaties were negotiated:

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.

Choctaw Nation v. *Oklaho* *supra* 397 U.S. at 630-31, 90 S.Ct. at 1334.

Several of the factors relied upon by courts in applying the canons of construction to treaties exist in the present case. Virtually none of the Indian participants to the treaty spoke English. All affixed an "X" mark in place of their signature. The Indians had to rely on interpreters for an explanation of concepts, most of which were foreign to their culture. Dr. Clifton testified about the lack of correspondence between English and the Ottawa and Chippewa languages. Only general concepts were discussed, not the precise meaning of particular words. Under these circumstances, to interpret particular words in the treaty so as to defeat or diminish a reserved right would be flatly contrary to these canons of construction.

It is also noteworthy that the Indians did not draft the treaty provisions. Rather, that was done out of their presence and behind closed doors by the treaty commissioners and the traders who escorted the Indians to Washington. It would be unconscionable, as the state has urged from time to time, to construe words in the treaty against the Indians when the facts establish that the Indians were not responsible for their selection.

The record is also clear regarding Schoolcraft's and the trader's conflicts of interest *vis-a-vis* the Indians. The traders were anxious that a treaty be negotiated in order that the Indians' debts to them be paid. Altogether the traders received over $220,000 as a result of the treaty. Five of the traders who escorted the Indians to Washington and wrote the treaty out of their presence—John Holiday, John Hulbert, Robert Stuart, Rix Robinson and Henry Levake—received in the aggregate of $57,000. (Tr. 1633; D.Ex. 312.)

Members of Schoolcraft's family—James Schoolcraft, William Johnston, Susan Johnston, George Johnston and the estate of

[471 F Supp 253]

John Johnston—received approximately $53,000 in payment for debts owed them by the Indians. Further, there is evidence that Schoolcraft knew about the existence of these debts before the treaty was negotiated. (Tr. 1652.)

In addition to the payments to traders, Article Ninth provided for payments to certain individuals in lieu of individual reservations. Those persons included Rix Robinson, John Holiday, Mary Holiday, William Lasley, Henry Levake and others. (Tr. 1643.) These persons received almost $50,000 under this article of the treaty.

Before their arrival in Washington and afterward, the trader-escorts engaged in liquor trade with the Indians, and other of the principals had provided liquor to the Indians. It is probable that Schoolcraft relied upon them to provide liquor at the time of the treaty signing.

Combining these factors and considering the conflicts that Schoolcraft and many traders had, there can be little doubt

but that the canons of treaty construction should be adhered to rigorously in this case.

This court adopts the meaning of the 1836 treaty consistent with the canons of construction. Under the 1836 treaty of cession, the Indians granted a large tract of land and water area to the United States. At the same time they reserved the right to fish in the ceded waters of the Great Lakes.

Because of the documented evidence demonstrating that the Indians were absolutely dependent upon fishing for subsistence and their livelihood, and reading the treaty as the Indians must have understood it, they would not have relinquished their right to fish in the ceded waters of the Great Lakes. Since the treaty does not contain language granting away the prior right to fish, that right remains with the Indians and was confirmed by the 1836 treaty.

The language contained in Article Thirteenth of the Treaty of 1836, by its own terms could not have limited the Indians' right to fish in the waters of the Great Lakes because these large bodies of water could not possibly be settled by homes, barns and tilled fields. While the Indians might have been willing to give up their right to hunt on various parcels of land as that land became occupied with settlers, the vital right to fish in the Great Lakes was something that the Indians understood would not be taken from them and, indeed, there was no need to do so. The western movement of non-Indian settlers could be accommodated without requiring the Indians to relinquish their aboriginal and treaty rights to fish. While the United States has the power to abrogate treaties by subsequent treaty or statute, it must do so expressly and emphatically. No such abrogation of the reserved treaty right to fish can be found.

C. *Reserved Fishing Rights.*

Guiding this court is a key concept essential to a proper interpretation of the treaty. This concept is deeply rooted in federal Indian law and was very recently reaffirmed by the Supreme Court in *United States* v. *Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). In *United States* v. *Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the United States sought to enjoin non-Indians from obstructing certain Indians from exercising their treaty rights to fish in the Columbia River. The Indians under their treaty reserved the right to fish at their usual and accustomed sites. However, in order to reach those sites it was necessary to cross land which, subsequent to the treaty, was acquired by private individuals. The Court stated:

> . . . *the treaty was not a grant of rights to the Indians, but a grant of rights from, them,—a reservation of those not granted.* And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named there-

[471 F Supp 254]

> in. They imposed a servitude upon every piece of land as though described therein.

198 U.S. at 381, 25 S.Ct. at 664 (emphasis supplied. *See also Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919), which affirmed *Winans, supra.* The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United

States to the Indians. Rather, the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. The grant from the Indians must be narrowly construed, especially in light of the wardship relationship existing between the Indian grantors and the grantee United States.

In addition to providing a conceptual framework for interpreting the treaty, *Winans* also teaches that reservations in treaties are not limited to land. Although the term "reservation" is commonly thought to pertain to land, other valuable rights not relinquished when Indians convey their aboriginal title are also reservations. The Indians can, and have, reserved rights to cross private land to reach traditional fishing sites as in *Winans, supra,* and *Seufert, supra.* In *Winters* v. *United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Indians reserved or retained water sufficient to irrigate their land reserve. The agreement creating the Fort Belknap Reservation out of a much larger tract occupied by the Indians was silent regarding rights to water from the Milk River. Both the area of cession and the smaller land reserve within it were arid and of little use without water:

> And this, it is further contended, the Indians knew [that the lands were arid], and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Winters v. *United States, supra* at 576, 28 S.Ct. at 211. *See also Cappaert* v. *United States,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); and *Arizona* v. *California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, *reh. denied,* 375 U.S. 892, 84 S.Ct. 144, 11 L.Ed.2d 122 (1963).

During the last term of the Supreme Court, *United States* v. *Wheeler, supra,* was decided. There the Court was faced with the issue of whether a tribe had authority to criminally prosecute an Indian despite the lack of a congressional act authorizing such prosecution. The Supreme Court, reaffirming the *Winans concept,*[21] stated:

> That the Navajo Tribe's power to punish offenses against tribal law committed by its members is an aspect of its retained sovereignty is further supported by the absence of any federal grant of such power. If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe.

United States v. *Wheeler, supra* 435 U.S. at 315, 98 S.Ct. at 1088. Thus, modernly the *Winans* doctrine is "alive and well" and applies not only to reserved rights to land, but to reserved rights to fish, reserved rights to water and reserved or retained rights of sovereignty, i. e., the right to tribal self-government. Equally important is that reserved rights, as in *Winters,* arise

---

[21] This Court has referred to treaties made with the Indians as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States* v. *Winans,* 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089.

by *implication*. And those notions are buttressed by the canons of treaty interpretation requiring a narrow construction of the grant made by the Indians.

[471 F Supp 255]

The Indians' claim to reserved fishing rights here depends upon their having possessed such rights at the time of the cession. The legal predicate to this holding is a holding that they possessed aboriginal rights in the area of cession. European nations coming to the New World claimed title to lands which they discovered and conquered. *See, Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955), *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823). Yet, the European nations generally, and Great Britain in particular, recognized an Indian right to occupy and use the lands claimed by these nations because of the Indians' aboriginal possession of the land. This right, a right of Indians to occupy land until the right is expressly extinguished by the claiming nation, was recognized by the United States in the Nineteenth century and is still recognized today. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *Worcester* v. *Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832); *Johnson* v. *M'Intosh,* 8 Wheat 543, 5 L.Ed. 681 (1823). Termination of this right is a political question. *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U.S. 335, 339, 65 S.Ct. 690, 89 L.Ed. 985 (1945). The Indians' right of occupancy, his "Indian title" is "as sacred as the fee simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 746, 9 L.Ed. 283 (1835).

The Confederated Congress recognized Indian aboriginal rights when it passed the Northwest Ordinance. These were then reaffirmed in the Treaty of Ghent. During the War of

1812 with the British, certain members of the Chippewa tribes fought in the War on the side of the British. The British suffered a series of defeats during the war, but Britain was determined not to permit this to affect her Indian allies.[22] Britain recognized Indian aboriginal rights during her occupation if the New World. She was resolved not to submit the Indians under her care to American sovereignty without treaty assurances that their rights would be absolutely respected. As noted by Senator Henry Clay and discussed above, Britain insisted that the Indians' rights not be interrupted, that this matter be included in the treaty ending the War of 1812, and made this demand a *sine qua non* to the conclusion of a peace treaty with the Americans. The Treaty of Ghent guarantees the Indians all the possessions, rights, and privileges which were recognized before the war.

As is clear from the history of these Indians in Michigan, the Chippewas and Ottawas actually, exclusively and continuously used and occupied the ceded areas for the "long time" required to establish aboriginal possession. Although Chippewas predominated in the Upper Peninsula and the Ottawas predominated in the southern areas of the ceded lands, these peoples inhabited the region in joint and amicable possession. *Strong* v. *United States*, 518 F.2d 556, 207 Ct.Cl. 254 (1975); *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 206 Ct.Cl. 649 (1976); *Turtle Mountain Band of Chippewa, Inc.* v. *United States*, 490 F.2d 935, 203 Ct.Cl. 426 (1974); *Sac and Fox Tribe* v. *United States*, 315 F.2d 896, 903, n. 11, 161 Ct.Cl. 189, 202 n. 11 (1963). These facts were implicitly and explicitly recognized by the United States when it negotiated the 1836 treaty.

---

[22]

The British record with regard to treatment of the American Indians is remarkably better than that of the United States. For an Indian expression of this viewpoint, see the speech of O-Ge-Maw-Ke-to, n. 3, *supra*.

As Dr. Tanner testified, the Indians' aboriginal occupation included not only a large land area but a significant portion of the Great Lakes. Accordingly, the cession is described as "all that tract of country . . . to the boundary line *in Lake Huron* between the United States and the British province of Upper Canada . . ." Further into Article First, the ceded area is described as:

> ". . . to a point in Lake Superior . . . thence south to the mouth of
>
> [471 F Supp 256]
>
> said [Chocolate] river . . . thence, in a direct line, *through the ship channel into Green bay* . . . thence south to a point *in Lake Michigan* . . . [and] comprehending all the lands and *islands* within these limits . . . . [Emphasis supplied.][23]

The important decision of the Michigan Supreme Court in *People* v. *LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) reached precisely the same conclusion regarding Article First:

> Moreover, the area described in Article First, that being the territory ceded by the Ottawas and the Chippewas to the United States, extends well into the Great Lakes.

---

[23]

In *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 623, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615, *reh. denied*, 398 U.S. 945, 90 S.Ct. 1834, 26 L.Ed.2d 285 (1970), the Supreme Court was required to interpret certain treaties to determine whether a reservation included the streambed of the Arkansas River. The Court concluded that the language ". . . thence down the main channel of the Arkansas River" was purposefully included and ruled that the tribe did have title to the bed of the river. If the United States had wanted to exclude the streambed it could have described the cession by reference to th north side or bank of the Arkansas River.

> For example, the ceded area is bounded in part by a line traveling from the mouth of the Thunder-bay river, "thence northeast to the boundary line *in Lake Huron* . . . thence northwestwardly, . . . *through the straits*, and river St. Mary's *to a point in Lake Superior* north of the mouth of *Gitchy Seebing*, or Chocolate River . . .."

People v. *LeBlanc*, 248 N.W.2d at 206 (emphasis in original, footnote omitted).

In exchange for this large cession of land and water the Indians received certain monetary payments and other goods and services from the United States. Within the area of cession the Indians reserved certain land parcels and rights under the treaty. In particular, they reserved nine land areas on the Upper Peninsula and five areas on the Lower Peninsula. The issue in question here is whether the Indians also possessed a right to fish in the waters ceded which they did not grant to the United States but reserved for themselves.

The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess. *Menominee Tribe* v. *United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); *Kimball* v. *Callahan*, 493 F.2d 564, (9th Cir. 1974); *People* v. *LeBlanc*, *supra*; *State* v. *Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972).

The factual predicate giving rise to the reservation or retention of the right to fish in the Great Lakes is a showing of the Indians' dependence upon that resource. The evidence relating to Indians' use of the fishery resource, as related above, is overwhelming.

Dr. Tanner testified about the life cycle of the Indians during treaty times which included two major fishing seasons, spring and fall, as well as ice fishing in the winter. Dr. Cle-

land placed the treaty Indians' use of the resource into a historic and prehistoric context. All Indians of the Upper Great Lakes, including the Ottawa and Chippewa, were fishing peoples. The settlement patterns of native peoples of the Upper Great Lakes, including the treaty Indians in the case at bar, were strongly influenced by available resources, especially fish. It is no mere coincidence that the Articles Second and Third land reserves are all located on the Great Lakes and all adjacent to important fishing grounds. It is also noteworthy that most major archaeological sites in the Upper Great Lakes are near or within Articles Second and Third land reserves. In order to reach a conclusion that the Indians were not dependent upon this valuable fishery resource, the court would have to ignore hundreds of years of recorded testimony and thousands of years of prehistoric information.

That the treaty Indians were commercial, as well as subsistence, fishermen is also well documented and beyond dispute. The Indians caught fish and traded them for goods available to them from the European mar-

[471 F Supp 257]

ket. They were employed by the American Fur Co. to catch fish. Indians operated their own commercial outfits and sold their catch to the American Fur Co. as well. Years after the treaty, Smith and Snell (Ex. P-4) reported that most of the fishermen they surveyed were of Indian heritage. Right down to today a significant proportion of commercial fishermen on the Great Lakes included within the area of cession are of Indian heritage.

The Michigan Supreme Court decision in *People* v. *LeBlanc*, *supra*, also supports plaintiffs' contentions regarding the commercial dimension of the Indian fishery:

> The record below [which was much less detailed than the record here] clearly indicates that fishing was central to the Chippewa way of life at the time the Treaty of 1836 was negotiated.
>
> • • • • • •
>
> Clearly, too, Chippewa fishing had a commercial dimension. In fact, Article Fourth of the Treaty of 1836 provided for the delivery of 10,000 fish barrels and 2,000 barrels of salt to the Indians over a twenty year period to be used in the fishing business.

People v. LeBlanc, 248 N.W.2d at 204 (footnote omitted).

The State would have this court find that the Indian fishery had no commercial aspect because, in effect, they did not own and operate the American Fur Co. But even the State's own witness testified that the Indians did not have the capital or the business experience to start such a venture. (Tr. 1770.) Besides, the American Fur Co. was "one of the most successful economic companies in the early American history, one of the prime examples of big business at this early period." (Tr. 1770.) This type of business activity simply has no analogue in the society of the Ottawa and Chippewa. If the standard the tribes are required to meet is that they too controlled a business like the American Fur Co.— the General Motors of the Great Lakes—then plaintiffs have failed. (*See* Tr. 1884.) However, there is no such burden on the Indians. Plaintiffs have shown that treaty Indians relied upon the resource for subsistence purposes and that their fishery had a substantial commercial dimension as well. From the beginning of the commercial market, as we understand and use that term today, the Indians were participants. Obviously they could not participate in a European-type market economy until there was one.

On the basis of the findings of fact above, which concluded that the Ottawa and Chippewa Indians of northern Michigan have relied upon the catching of fish in the Great Lakes for subsistence and for commerce for centuries, and that such a reliance has been the one most important single aspect of their lives from a time at least one hundred years before any contact with Europeans right up until the time of the signing of the Treaty of 1836, this court rules as a matter of law that the Indians who are plaintiffs in this action held an aboriginal and treaty right under the Treaty of Ghent to catch fish in the Great Lakes at the time of the 1836 Treaty. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).

Under *Winans, supra,* Indians retain whatever rights they possess which are not relinquished by treaty or taken by Congress. Rights are reserved by implication if they are not expressly relinquished and a contrary conclusion is inconsistent with the use of the resource by the Indians at the time of the treaty. *United States* v. *Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Cappaert* v. *United States,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona* v. *California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Winters* v. *United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *United States* v. *Winans, supra.*

On the basis of the following facts: (1) the Treaty of 1836 contains no language expressly relinquishing the aboriginal right of the treaty Indians to fish in the ceded waters; (2) at the time of the 1836 treaty subsistence and commercial fishing was essential to the livelihood of these Indians and

for them to have relinquished fishing rights would have been tantamount to agreeing to a systematic annihilation of their culture, and perhaps of their very existence; (3) both parties to the negotiation were aware that the Indians had no way of sustaining themselves in Michigan except by fishing, and (4) the Indians did not understand the treaty to limit their right to fish, it is clear that by the Treaty of 1846 the Indians impliedly reserved a right to fish commercially and for subsistence in the ceded waters of the Great Lakes. *Winters* v. *United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1980); *United States* v. *Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). This holding is required by the above findings of fact and conclusions of law and by the rules of construction set forth in the beginning of this opinion. Further, however, in view of the dismal history which generally surrounds the dealings of the United States with these first inhabitants of this land, and the history of this specific treaty negotiation, punctuated by numerous instances of underhanded and perfidious dealings with these trusting and gentle people, simple justice requires that this court begin to put an end to the unfairness which has plagued the Indians in their dealings with the white man from their first contact with him, and restore to the Indian that which was by nature his, and now by right also. The holding does not go so far as to void the treaty because of lack of consent. *See, e. g., Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903), where the Court held that it could not consider the validity of an agreement allegedly obtained by fraudulent misrepresentation because the question of the validity of the agreement belonged to Congress. The language of the treaty does grant territory to the United States. *DeCoteau* v. *District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *United States* v. *Choctaw Nation*, 175 U.S. 494, 531, 21 S.Ct. 149, 45 L.Ed. 291 (1903). Were it not for *Lone Wolf, supra*,

and *DeCoteau, supra,* which proscribe invoking the canon that legal ambiguities are to be resolved to the benefit of the Indians to the extent of disregarding clear expressions of tribal and Congressional intent, this court, would, on the record before it, identify this as an invalid treaty because it was the product of fraud, duress, conflicts of interest, coercion, and was very likely produced by the alcohol of liquor peddlers who sought to keep the Indians from knowing what they were doing.

D. *Article Thirteenth as Protection of the Right.*

As the court ruled in *People* v. *LeBlanc, supra,* the language of Article Thirteenth embraced the right to fish even though fishing is nowhere specifically mentioned in the language of the treaty article:

> Given the central position of fishing, both subsistence and commercial, in the Chippewa culture during the time period of the Treaty of 1836, there can be little doubt that the Indian stipulation in Article Thirteenth "for the right of hunting on the lands ceded, with the other usual privileges of occupancy" was understood by the Chippewas to include the right to fish.

People v. *LeBlanc, supra,* 248 N.W.2d at 205.

The construction of the treaty language is consistent with numerous state and federal decisions. In *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404, 405-6, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968), the Supreme Court held that the Treaty of Wolf River which created a home for the Indians "'. . . to be held as Indian lands are held . . .'" included the right to hunt and fish:

> Nothing was said in the 1854 treaty about hunting and fishing rights. Yet we agree with the Court of Claims

> that the language "to be held as Indian lands are held" includes the right to fish and to hunt. The record shows that the lands covered by the Wolf River Treaty of 1854 were selected precisely because they had an abundance of game. See *Menominee Tribe* v. *United States*, 95 Ct.Cl. 232, 240-241 (1941). The essence of the Treaty of Wolf River was that the Indians were
>
> [471 F Supp 259]
>
> authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.

391 U.S. at 406, 88 S.Ct. at 1707 (footnotes omitted). *See also Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974), and *State* v. *Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972).

Both Drs. Tanner and Clifton testified regarding the Indians' understanding of Article Thirteenth and said that the term "usual privileges of occupancy" included the use of all of the ceded area including the Great Lakes fishery.

The phrase of Article Thirteenth which purports to limit the right—"until the land is required for settlement"—was discussed above in the findings of fact. It is ambiguous as to any definite period of Indian occupancy. Since it was understood by the Indians not to affect their aboriginal and treaty rights to fish, but to leave them with the right to fish "as long as the sun rose and the waters flow," it cannot operate to terminate these fishing rights. It was only intended by the United States to limit Indian use of particular plots of land.

The Supreme Court of Michigan came to an analogous conclusion in *People* v. *LeBlanc*, *supra*, when it stated:

> Undoubtedly this clause ["until the land is required for settlement"] was intended to protect the right of non-Indians to settle in the ceded area without interference from Chippewas claiming "the usual privileges of occupancy," and has limited the rights of the Chippewas to hunt. However, the ceded water areas of the Great Lakes have obviously not been required for settlement, and therefore the fishing rights reserved by the Chippewas in these areas have not been terminated.

People v. *LeBlanc, supra,* 248 N.W.2d at 207. The Michigan Supreme Court relied upon the fact that any other conclusion would contort the English language.

I expressly adopt this holding as an additional ground for the conclusion that the limiting clause of Article Thirteenth does not impose a temporal limitation upon Indian aboriginal and treaty fishing rights in the Great Lakes.

In summary, the wellspring of the reserved right to fish in the ceded waters of the Great Lakes rests on its implied reservation from the grant of land from the Indians to the United States and also on Article Thirteenth. The right is implied because it was never explicitly ceded away by the Indians; thus, they retained it. The reason it was not granted was because the Indians were too heavily dependent upon fish as a food source and for their livelihood to ever relinquish this right.

It must be remembered that one of the principal purposes behind the 1836 treaty was to pave the way for anticipated population growth caused by the westward and northward movement of settlers. Clearly this could be accomplished without the Indians surrendering their pre-existing rights to fish in the Great Lakes.

In addition to the Indians' implied reservation of this aboriginal right protected by the 1836 Treaty and their right under the Treaty of Ghent, the express language of Article Thirteenth protects the Indians' right to fish in the ceded waters of the Great Lakes.

E. *Scope of the Present Indian Fishing Rights.*

The scope of the Indian right to fish at the present time is defined by the character of Indian fishing at the time of the treaty. Accordingly, the retained aboriginal right is not limited to any geographical area within the ceded area. Evidence has revealed that the Indians of 1836 fished extensively over the entire ceded area. They had the means to cover the entire ceded area and went where the fish were to be found. Therefore, the right cannot be limited in any artificial manner to imaginary and unrealistic boundaries within the area of cession. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943).

[471 F Supp 260]

Similarly, the means used to fish were not restricted by the Treaty of 1836 nor by the Indians in any other agreement with the United States. The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the pupose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish. *Peterson* v. *Christensen*, 455 F.Supp. 1095 (E.D.Wis.1978); *United States* v. *Washington*, 384 F.Supp. 312 (W.D.Wash.1974); *State* v. *Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972).

F. *The Removal Act.*

The State endeavored to show that the Treaty of 1836 obligated the Indians to remove from Michigan to lands west of the Mississippi and that consequently the Indians were not concerned to preserve their aboriginal rights. Testimony was adduced through the State's witness, Dr. Mason, to the effect that removal was tantamount to an accomplished fact and that all persons associated with the treaty, including the Indians, knew that removal would take place at the time the treaty was negotiated.

The State's position in this matter ignores the history of the Michigan Indians, the Removal Act, and the language of the treaty here in question.

First and foremost it must be remembered that removal of the Ottawa and Chippewa never occurred. Indeed, descendant Indians and successor tribal groups to those signing the 1836 treaty have remained in Michigan to this date and are party plaintiffs in this litigation. So long as the Indians remain in the area of the cession, they may continue to exercise their reserved aboriginal and treaty rights to fish in the Great Lakes.

The Removal Act of 1830 does not mandate that the President negotiate treaties requiring removal. It is permissive in nature. Congress did nothing to lessen the obligation of the Executive toward the Indians.[24] The principal authorization of the Act is to make it lawful for the President to offer Indians who chose to exchange their homelands, lands west of the Mississippi belonging to the United States. The Act did nothing to relieve the United States of prior treaty obligations toward any Indian tribes. Section 7 of the Act declares: "Provided, That nothing in this act contained shall be construed

[24]

4 Stat. 411. *American Heritage Pictorial History of the Presidents*, Vol. 1, p. 224 (1968).

as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes."

When the removals took place under this Act, it was at the "request" of President Jackson. It was at Jackson's behest that Cass and Schoolcraft sought to have the Indians of Northern Michigan removed. They were not successful, however. The language of the 1836 treaty does not mandate removal of the Indians. It stated that ". . . as soon as the said Indians desire it . . ." and later in the Article ". . . When the Indians wish it, the United States will remove them . . . ." To argue that this language mandates removal is patently absurd. Similarly, many of the treaties negotiated during the 1830's did not mandate removal.

Government officials and the United States Senate knew how to select language mandating removal when they desired.[25]

---

[25]

The language of two removal treaties introduced into evidence clearly establishes this point. The 1833 Treaty with the Chippewa (Ex. P-188) includes the following language:

> And it is further agreed that as fast as the said Indians shall be prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new home. It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States.

The 1832 Treaty with the Winnebago (Ex. P-187) provided in pertinent part:

> The exchange of the two tracts of country to take place on or before the first day of June next; that is to say, on or before that day, all the Winnebagoes now residing within the country ceded to them, as above, shall leave the said country, when, and not before, they shall be allowed to enter upon the country granted by the United States, in exchange.

[471 F Supp 261]

Comparing the language of the 1832 Treaty with the Winnebago and the 1833 Treaty with the Chippewa to the language employed in Article Eighth in the Treaty of 1836, the conclusion is inescapable—the Treaty of 1836 did not require, obligate, or mandate removal of the Indians to lands west of the Mississippi.

None of the critical correspondence between government officials leading to the 1836 treaty mentions the word "removal." The treaty instructions to Schoolcraft from Lewis Cass dated March 11, 1836 (Ex. P-53, 53A) did not mention the word "removal." The treaty minutes (Ex. P-17, 17A) are devoid of that word as well. The first time the term "removal" appears is in the treaty itself, and then only in the context of permissiveness.

Dr. Tanner testified regarding the Indians' objections to removal. The Indians in the Upper Peninsula did not even regard removal to be a threat. They refused to send delegates to travel with James Schoolcraft to view the land west of the Mississippi. Those Indians who went were largely from the Lower Peninsula and did not represent the Indians throughout the area of cession. With the exception of one person, none of the Indians were designated as first, second or third class chiefs in the list attached to the Treaty of 1836. (*See* Ex. P-190). Those Indians who went on the James Schoolcraft exploring party did not agree to remove, assuming *arguendo* they were clothed with authority to represent all Indians

---

Later in that same treaty, Article XI provided:

> Article XI: In order to prevent misapprehensions that might disturb peace and friendship between the parties to this treaty, it is expressly understood that no band or party of Winnebagoes shall reside, plant, fish, or hunt after the first day of June next, on any portion of the country herein ceded to the United States.

throughout the ceded territory. They agreed to accept the land they visited, but only if any Indians personally chose to remove. (State Ex. P-62, 99.)

Straining these facts to their limit and beyond would not demonstrate that the parties to the treaty knew that removal was an accomplished fact at the time the treaty was negotiated. At best the facts demonstrated that the treaty commissioners were planning for future contingencies. If settement of the state occurred at the pace anticipated, which it did not, and if Indians requested removal, which they did not, it was possible that removal might occur at some time in the future. There was not even a time certain at which removal was to occur.

The fact that the Indians stayed in Michigan expresses their intentions more eloquently than any other fact which has been presented to the court. The Indians did not remove. Because the Indians stayed in Michigan and it has been previously determined that they retained their aboriginal rights and Treaty of Ghent rights to fish in the Great Lakes, they retain the right to fish in the waters of the Great Lakes today.

G. *The Fishing Rights Reserved by the Treaty of 1836 Were not Relinquished by the Treaty of 1855.*

1. *A Treaty Right May be Abrogated or Extinguished Only by the Most Explicit and Unequivocal Act of Congress.*

Through the interweaving of thousands of statutes, treaties and court decisions, a complex relationship has developed interrelating the respective powers of Indian tribes, the federal government and the states. From the founding of this nation to the present, however, certain principles governing those relationships have held

[471 F Supp 262]

firm. One such principle is that Indian tribes retain all powers of self-government, sovereignty and aboriginal rights not explicitly taken from them by Congress. *McClanahan* v. *Arizona Tax Com'n, supra; Williams* v. *Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); *Ex parte Crow Dog,* 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). Another principle is that the federal government, acting primarily through Congress, has plenary authority over Indians and Indian tribes. *Warren Trading Post* v. *Arizona Tax Com'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Williams* v. *Lee, supra; United States* v. *Nice,* 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); *United States* v. *Rickert,* 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); *United States* v. *Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

These two principles—plenary federal authority over Indians and retention of tribal powers—interface in the doctrine surrounding abrogation of existing treaty rights. While Congress has the plenary authority to abrogate the fishing rights reserved by the Treaty of 1836, it must do so expressly and unequivocally. The intention to abrogate or modify a treaty provision will not be lightly imputed to Congress. *Menominee Tribe* v. *United States, supra; Pigeon River Improvement Slide & Boom Co. v. Cox, Ltd.,* 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695 (1934); *United States v. White,* 508 F.2d 453 (8th Cir. 1974); *Kimball* v. *Callahan, supra.* Congressional acts purporting to abrogate or modify treaty rights are subject to the same canons of construction as are Indian treaties.

An important case applying the express abrogation doctrine to hunting and fishing rights is *Menominee Tribe* v. *United States, supra.* In that case the Supreme Court was faced with the issue of whether the tribe's hunting and fishing rights,

which were reserved by the Treaty of Wolf River, had been abrogated by a later congressional act terminating the reservation. Under the act (Menominee Indian Termination Act of 1954, 68 Stat. 250, 28 U.S.C. §§ 891-902), the reservation was taken out of federal ownership, and federal supervision over the tribe and its members ended. Because the language of the termination act did not explicitly mention the extinguishment of hunting and fishing rights, the Supreme Court held that those treaty rights survived termination. Thus, tribal members were free to hunt and fish, pursuant to their treaty, even though the United States no longer considered them to be its wards. *See also, Kimball* v. *Callahan, supra.*

Defendants have argued that the Treaty of 1855 abrogated the Indians' reserved fishing rights. This contention has centered in Articles 3 and 5 of the Treaty. Neither of those articles had any effect whatever on the reserved fishing rights.

2. *Article 3 of the Treaty of 1855.*

As the record amply demonstrates ,the "liabilities" and "legal and equitable claims" released by Article 3 were *financial* —and *only* financial—matters, and did not include the reserved fishing right. Given those facts, it is clear that the Michigan Supreme Court was correct when it held that the fishing rights secured by the Treaty of 1836 were not released or abrogated in Article 3 of the Treaty of 1855. *People* v. *LeBlanc, supra.* As that Court said:

> While it is conceivable that the United States intended "claims . . . for other things" in the Treaty of 1855 to refer to fishing rights reserved by the Chippewas in the Treaty of 1836, such seems highly unlikely given the complete absence of any discussion of the termination of such rights in the treaty negotiations.

In any case, it is clear that the Chippewas and the Ottawas would not have understood Article Three of the Treaty of 1855 to terminate hunting and fishing rights reserved in the Treaty of 1836 given the absence of any mention of such prospect.

• • • • • •

> Given, then, the rules of construction mandating that a treaty should be inter-
>
> [471 F Supp 263]
>
> preted as the Indians understood it, and that the language of the treaty should not be read to the prejudice of the Indians, we will not strain the language of Article Three of the Treaty of 1855 to mean that reserved fishing rights pursuant to the Treaty of 1836 were terminated.
>
> Our conclusion is buttressed by the directive of the United States Supreme Court that "the intention to abrogate or modify a treaty is not to be lightly imputed." *Menominee Tribe* v. *United States, supra,* 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697.

248 N.W.2d at 211-12.

This interpretation of Article 3 is also supported by the decision of the Court of Claims in *Ottawa and Chippewa Indians* v. *United States,* 42 Ct.Cl. 240 (1907). There, the Indians sued the United States to recover $19,000 plus accrued interest which represented the $1,000 per year mandated by the 1836 treaty to be invested in stock of the Treasury Department. The United States set the money aside each year beginning in 1836 and ending in 1855 when it "covered" the money into the Treasury.

The government in that litigation contended that Article III of the 1855 treaty operated to release the United States from

the Indians' claim to the $19,000 plus accrued interest. The Court of Claims disagreed because the treaty released the United States from delivering various goods, services or annuities *in the future*. Thus, as to the consideration flowing from the United States to the Indians which had been promised under old treaties but not yet delivered, Article III operated as a release. However, the $1,000 annuity appropriated by Congress and in fact set aside was not released by Article III because it was not an *executory promise* of the United States. Rather, it was an *executed promise*, a promise already performed by the United States and, therefore, not released by Article III of the 1855 treaty.

The Court of Claims' analysis is consistent with plaintiffs' contention herein and with the Michigan Supreme Court's decision in *LeBlanc*. A reserved "right" is not a "legal or equitable claim or liability." Article 3 operated to release the United States from those promises previously made to the Indians, but not fulfilled, for goods, services and monies; it did not release the United States from promises made and in fact performed. *Ottawa and Chippewa* v. *United States, supra.* The fishing "right" originated in and remains to this day with the Indians; the right did not originate with and was not given to the Indians by the United States. The United States could not release a right it did not own. It was the Indians alone who had the power to release their fishing rights and this they have never done.

As we have seen, the Treaty of 1855 constituted a formal abandonment by the federal government of any effort to remove the Indians of the treaty area from Michigan. (*See, e. g.*, Ex. P-89 and 89A.) One of its avowed purposes was to provide the Indians with permanent homes in Michigan. It would have been wholly illogical to allow the Indians to stay in Michigan but prohibit them from engaging in their fishing practices in the Great Lakes. Such a prohibition would have

left the Indians destitute and deprived them of a traditional activity vital to their subsistence and commercial pursuits.

Since the reserved right to fish in the ceded waters is not a "liability on account of former treaty stipulations" or a "legal or equitable claim" within the meaning of Article 3 of the Treaty of 1855, as set forth above, the Indians did not cede surrender or relinquish their fishing right by Article 3. *People* v. *LeBlanc, supra,* 248 N.W.2d at 211-12. *See also, Ottawa and Chippewa Indians* v. *United States,* 42 Ct.Cl. 240 (1907). The right to fish was not even discussed in the treaty negotiations. The restriction of Indian rights proposed by the State will not be implied from such general treaty language. *Menominee Tribe* v. *United States,* 391 U.S. 404, 88 S.Ct. 1705 (1968). Article 3 had nothing whatever to do with fishing rights and no impact whatever upon them.

[471 F Supp 264]

3. *Article 5 of the Treaty of 1855.*

It is clear that Article 5 has no effect either upon fishing rights secured by the Treaty of 1836 or the modern political successors to the treaty Indians—Bay Mills and the Sault Tribe.

Article 5 of the Treaty of 1855 was inserted in that treaty for the convenience of the United States in its future dealings with the Indian bands.

This clause was intended to accomplish two goals: to relieve the United States of the burden of convening general councils in the event local matters required attention in the future, and to satisfy the Ottawa and Chippewa's desire to be treated separately. Article 5 had no impact on the governmental structure of the bands. There was no change in the way in

which the Indian agents dealt with them after the treaty, except that they were never convened again as one group. (Tr. 331-35.)

Like Article 3, Article 5 has nothing whatever to do with reserved fishing rights. Although this issue was not raised in the *LeBlanc* litigation, the Michigan Supreme Court's reasoning concerning Article 3 is dispositive. The Court refused to construe the release clause as an abrogation of reserved rights because there was no discussion of fishing rights during the treaty negotiations, because the Indians would not have understood Article 3 to terminate hunting and fishing rights and because construing the language as an abrogation would be wholly contrary to the canons of treaty construction.

This same reasoning applies to Article 5. But the meaning of Article 5 can be easily discerned from the four corners of the treaty. There are no ambiguities to be resolved in favor of the Indians. The United States wanted to handle disputes arising as a result of the 1855 treaty on a localized basis and sought to avoid the need for calling a general convention of the Indians to resolve future problems, and the Indians of the treaty area wished to be treated with locally, and not as an artificial "Ottawa and Chippewa nation." This—and only this—is what Article 5 accomplishes.

Article 5 also has no effect upon the plaintiff-intervenor tribes, Bay Mills and the Sault Tribe. Both tribes are modern political successors in interest to the Indians who were party to the Treaty of 1836. Both are recognized by the United States as currently functioning Indian tribes maintaining tribal governments. Both tribes have reservations held in trust for them by the federal government—reservations which are within the boundaries of the reservations retained in the Treaty of 1836. Each tribe is organized pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, and operates under

a constitution and by-laws adopted pursuant to that section. The membership criteria embodied in the constitutions of both tribes require that tribal members be Indians of the treaty area. (Tr. 1059-62, 1127-29; Ex. P-119, 120.)

The federal government, through the Department of the Interior, has recognized and confirmed that Bay Mills and the Sault Tribe are political successors in interest to the Indians of the treaty area. The Department is holding reservations in trust for the tribes, approving tribal constitutions and issuing treaty fishing identification cards to tribal members pursuant to 25 C.F.R. Part 256. The proclamation of a reservation and the approval of a tribal constitution are acts of recognition and acknowledgment of a federal relationship. *United States* v. *John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489, 500 (1978). Courts will not disturb what Congress or the executive have done in terms of organizing or recognizing the political authority of Indian tribes. *United States* v. *Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *United States* v. *Holliday*, 70 U.S. (3 Wall. 407, 18 L.Ed. 182 (1867); *United States* v. *Washington, supra*. As the agency charged with the administration of laws affecting Indians, actions and interpretations of the Department of the Interior are entitled to "great weight." *United States* v. *Jackson*, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930).

[471 F Supp 265]

Even if the federal relationship with Indian tribes or bands is not continuous, this does not destroy federal rights or bar the recognition of present tribal groups as political successors in interest. *United States* v. *John, supra*. Even if the Treaty of 1855 were the *only* source of the tribe's federal relationship, the treaty provision would not end aboriginal federal rights or prevent recognition of a modern tribal group as a political successor in interest. *United States* v. *John, supra*. *See also*,

United States v. *Wright*, 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (1931).

H. *Whether a Reservation exists in Whitefish Bay is not Before the Court in this Phase of the Trial.*

Phase One of the trial in this case was limited to questions about fishing rights. The question of whether a reservation continues to exist in Whitefish Bay has implications for whether the Bay Mills tribe has exclusive fishing rights in that area of Lake Superior, but this question goes beyond whether the Indians retained aboriginal and Treaty of Ghent fishing rights in the Treaty of 1836 which were not abrogated by the 1855 treaty. Accordingly, at the present time I decline to consider the evidence presented on this issue and do not rule on the questions of law involved.

I. *The State of Michigan Cannot Regulate Indian Treaty Fishing in Accordance with Existing Principles of Indian Law.*

1. *The State's Power to Affect Treaty Rights Fishermen is Preempted by the Supremacy Clause.*

A fundamental principle of federal constitutional law is that a state may not enact or enforce any statute or regulation in conflict with treaties between the United States and Indian tribes. The Supremacy Clause of the United States Constitution (Article VI, clause 2) states just that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause is applicable to international treaties and Indian treaties alike. *See United States* v. *43 Gallons of Whiskey*, 108 U.S. 491, 2 S.Ct. 906, 27 L.Ed. 803 (1883); *United States* v. *43 Gallons of Whiskey* [*U.S.* v. *Lariviere*], 3 Otto 188, 93 U.S. 188, 23 L.Ed.2d 846 (1876); *Worcester* v. *Georgia, supra*. It is equally well established that a matter generally within the exclusive power of a state, such as fish and game management, is preempted by the federal government when a federal purpose, as evidenced by a treaty or statute, is dominant and would otherwise be frustrated. *See Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977). The Ninth Circuit in *United States* v. *Washington, supra*, at 684, cogently summarized these principles in a treaty fishing rights case:

> By virtue of its police power, the state has initial authority to regulate the taking of fish and game. *Geer* v. *Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896). The federal government, however, may totally displace state regulation in this area. . . . The Federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. *Missouri* v. *Holland*, 252 U.S. 416, 432, 40 S.Ct. 382, 64 L.Ed. 641 (1920). Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. *Asakura* v. *City of Seattle*, 265 U.S. 332, 341, 44 S.Ct. 515, 68 L.Ed. 1041 (1924). Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and Indian nations.

[471 F Supp 266]

To paraphrase the Ninth Circuit's analysis, the issue in this case is not whether the federal government has the power to preempt Michigan fishing laws and regulations (since it clearly does), but whether the federal government has done so by entering into the treaties of 1836 and 1855 and by their subsequent implementation. *See, e. g., Menominee Tribe* v. *United States, supra; Puyallup Tribe* v. *Dept. of Game (Puyallup I)*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); *Tulee* v. *Washington, supra; United States* v. *Winans, supra; Worcester* v. *Georgia, supra; Kimball* v. *Callahan, supra; Skokomish Indian Tribe* v. *France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943, 84 S.Ct. 797, 11 L.Ed.2d 767 (1964); *Maison* v. *Confederated Tribe of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963).

Although generally state law is often applicable to Indians outside a reservation, there can be no application where it would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). A treaty guaranteeing a right to fish distinct from that enjoyed by other citizens is such an express federal law. *United States* v. *Washington, supra*, 520 F.2d at 684. As is clear in this case, the Michigan Indians had both aboriginal rights and rights guaranteed by the Treaty of Ghen when they signed the 1836 Treaty. They retain these rights. Other citizens of Michigan possess only a privilege to fish. That they possess a mere privilege is recognized by Michigan law. M.C.L.A. 308.1 (Supp.1978). The Treaty of March 28, 1836 (7 Stat. 491) guarantees a right to fish which is distinct from the *privilege* to fish enjoyed by other citizens of the State of Michigan. *United States* v. *Winans*, 198 U.S. 371, 380-81, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *United States* v. *Washington*, 384 F.Supp. 312 (1974).

The point of the preemption doctrine, simply stated, is that state regulation in an area where the federal purpose is dominant and state regulation would be at cross purposes with federal objectives is violative of the Supremacy Clause and must fail even where Congress has not explicitly proscribed the reach of state law. The principle is especially important where federal purposes are expressed not by mere legislation but by a solemn exercise of the treaty power and where the exercise concerns Indians, a subject manifestly within the ambit of federal powers.[26]

It is well established that the usual right of a state to manage game within its boundaries[27] is not infringed by a federal treaty and regulations under it concerning taking game within the state, because the sovereign power of the state must yield to paramount federal power.[28] *Missouri* v. *Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). In *Holland*, the court rejected a challenge by the state to federal enforcement of certain game regulations promulgated in furtherance of the Migratory Bird Treaty on the ground that it would be an unconstitutional interference with the state's sovereign power.

---

[26]

See McClanahan v. *Arizona Tax Com'n*, *supra* at 172. *See also Byran Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), where the Supreme Court construed a federal statute authorizing states, under certain circumstances, to assume civil and criminal jurisdiction over reservation Indians so as not to include state or local taxing authority to affect Indian lands or Indians income derived from activities within reservations.

[27]

Geer v. *Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896).

[28]

Cf New Mexico State Game Com'n v. *Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied sub nom., New Mexico State Game Com'n* v. *Hickel*, 396 U.S. 961, 90 S.Ct. 429, 24 L.Ed.2d 426 (1969); *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549, 44 S.Ct. 186, 68 L.Ed. 437 (1923); *Hunt* v. *United States*, 278 U.S. 96, 100, 49 S.Ct. 38, 73 L.Ed. 200 (1928).

While recognizing that the subject matter—game regulation—is generally a state prerogative, the court found that "a treaty may override its power," 252 U.S. at 434, 40 S.Ct. at 384, because "[H]ere a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power." 252 U.S. at 435, 40 S.Ct. at 384.

[471 F Supp 267]

The circumstances in this case bear out the tremendous national importance placed upon the treaties at the time the United States sought to negotiate them. Legal authorities support the proposition that it continues to be in the national interest to observe and enforce treaty obligations owed to Indians. Fulfilling these obligations to Indians is no less lofty a national priority than the protection of migratory birds.

The line of cases dealing with treaty fishing rights secured by the "Stevens treaties" of the Northwest, such as *Puyallup Tribe* v. *Washington (Puyallup I)*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) and its progeny, which have allowed a sharply limited power in the state to regulate the exercise of off-reservation treaty fishing rights, must be distinguished from the present case.

In *Puyallup Tribe of Indians* v. *Washington*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) *(Puyallup I)*, and *Washington* v. *Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973) *(Puyallup II)*, the United States Supreme Court ruled that because of the language contained in the Indian treaty with the Puyallup Indians, the state had a right to regulate Indian fishing for purposes of conservation of the fishing resources, provided that those regulations did not discriminate against the Indians.

However, there appears tto be some inconsistency within the Court's two opinions on the right to regulate treaty rights. In *Puyallup I*, the Court seemed to be making a distinction between the treaty right to fish in certain places, and the right to fish in a particular manner. It appears that the Court saw the first right—the right to fish in accustomed places—as being a Treaty right, and the second as a right which was held in common with the rest of the citizens of the State, and therefore subject to the ordinary state police power, i. e., regulation for conservation purposes. The second right was not seen as being a treaty right.

For example, in *Puyallup I*, the Court states: "the right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State . . ." 391 U.S. at 398, 88 S.Ct. at 1728. Thus even though the Indians may hold this right in common with the non-Indian citizens of the state (e. g., Indians and non-Indians may fish side-by-side at the same spot), since this is an express *Treaty* right, it may not be regulated by the State.

However, it appears that the Court in *Puyallup I* saw the manner of fishing as being outside the rights conferred by by the treaty:

> [T]he manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed" manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed.

391 U.S. at 398, 88 S.Ct. at 1728. Again, later in the Opinion, where it was speaking of a similar case which it had advanced in support of this distinction, the court states:

> In other words, the "right" to fish outside the reservation was a treaty "right" that could not be qualified or conditioned by the State. But "the time and manner of fishing necessary for the conservation of fish," not being defined or established by the treaty, were within the reach of state power.
>
> The overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved.

391 U.S. at 399, 88 S.Ct. at 1729.

The Court in *Puyallup I* appears to be saying that the treaty *right* is the *right to fish* at accustomed places, and being a treaty right, it is not subject to regulation by the State. The right to fish in a certain manner is not a treaty right, however, and thus is subject to the usual police powers of the State.

In *Puyallup II*, however, the Court appears to shift ground. First, it states that the manner of fishing is now also a treaty right: "Our prior decision recognized that net fishing by these Indians for commercial

[471 F Supp 268]

purposes was covered by the Treaty." 414 U.S. at 48, 94 S.Ct. at 333. However, there is no language in *Puyallup I* which indicates that Indian commercial fishing was protected by the Treaty. In fact, the language in *Puyallup I* indicates that the Court recognized that Indian commercial fishing existed at the time of the signing of the Treaty, but the Court nevertheless went on to draw its place-manner distinction: "But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty." 391 U.S. at 398, 88 S.Ct. at 1728.

It appears that instead of acknowledging that its definition of the Indian treaty fishing rights was too narrow in *Puyallup I* though, the Court let that decision stand while implicitly modifying it in *Puyallup II*.

A second major shift in *Puyallup II* from the opinion in *Puyallup I* is that the Court indicates that the Treaty rights may now be restricted by the State police power:

> Rights can be controlled by the need to conserve a species; . . . the police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

414 U.S. at 49, 94 S.Ct. at 334. Thus the Court changed the legal framework of the situation. It went from a treaty right to fish a certain location, totally free from state regulation, plus an ordinary right to fish in a certain manner, subject of course to the state police power, to a scenario where all aspects of Indian fishing are now treaty-granted rights, but that the state has an undefined right to regulate this treaty right to "conserve a species."

In *United States* v. *Washington*, 384 F.Supp. 312 (W.D. Wash.1974), Judge Boldt noted that dicta followed by the United States Supreme Court in cases approving state police power regulation of Washington Indians' treaty right fishing is not sound in legal logic or principle. Before *Puyallup I* was decided, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968), there were no cases which provided judicial analysis or citation of a non-dictum decision supporting police power state regulation of the exercise of Indian off-reservation treaty fishing. 384 F.Supp. at 336. *See, Tulee* v. *Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); *Lacoste* v. *Depart-*

ment of Conservation, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924); *Patsone* v. *Pennsylvania*, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539 (1913); *United States* v. *Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *Ward* v. *Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896); *Geer* v. *Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896). *Kennedy* v. *Becker*, 241 U.S. 556, 36 S.Ct. 705, 60 L.Ed. 1166 (1919), involved a treaty which contained a fishing clause "fully satisfied by considering it a reservation of a *privilege* of fishing . . . ." At 563, 36 S.Ct. at 707-708. (Emphasis supplied.) The conveyance there was not to the United States; the lands passed directly into private ownership, the Indians retaining a right against the grantees and all who might become owners of the lands. Here the Indians assert, and this court has held that they retained an aboriginal right to fish, confirmed and reaffirmed by treaty, when they conveyed their lands to the United States. There can be no contention that this right was a mere privilege. The Indians did not submit to the sovereignty of the State when they made their conveyance, nor did they retain rights only relative to a private owner.

The district court in *United States* v. *Washington*, 384 F.Supp. 312 (1974), also commented on the lack of supporting authority in the Supreme Court's decisions:

> [T]hat the exercise of such [an Indian fishing] right may be limited in any way by the police power of a state, without having previously received authority to do so from Congress, seems to be diametrically opposed to relevant treaty law and personal civil rights decisions, particularly those of recent years.
>
> In the *Puyallup-II* decision, . . . it was stated (414 U.S. p. 2, 94 S.Ct. p. 332):

[471 F Supp 269]

"The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout."

Other than by recital or quotations from *Puyallup-I* and State Supreme Court decisions, in *Puyallup-II* there was no discussion of or ruling upon the basis of state police power to regulate off reservation treaty right fishing unless it be derived from the next to the last paragraph in the opinion of Justice Douglas (pp. 5-6, 94 S.Ct. p. 333): "We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Whatever the above quoted statement may have added to or taken from the right to exercise the off reservation treaty fishing rights of the plaintiff tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land." 384 F.Supp. at 337-38.

The district court also questioned whether or not Congress was the only one permitted under the Constitution to restrict treaty fishing rights:

> It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights. It may be that the refusal or failure of Congress to exercise a specific prerogative, by enactment of legislation, would legally justify judicial exercise of that particular prerogative. If so, it has never been stated or indicated in any United States Supreme Court decision as the basis or source of authority for the federal judicial decisions authorizing state regulation of off reservation treaty fishing rights.
>
> Since Congress has the power to qualify or revoke any treaty or any provision thereof, unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation. In these circumstances it is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained.

Id. at 338-39 (footnotes omitted.)

However, because it was construing the same Indian treaty language which the Supreme Court had before it in the *Puyallup* cases, the district court in *United States* v. *Washington*,

supra, was constrained to follow the Supreme Court decisions. *Id.* at 339.

This court believes that the older Supreme Court decisions holding that federal treaty rights cannot be restricted by the states are the better reasoned cases. Were it construing the *Puyallup* treaty, however, it would also find itself bound to follow the Supreme Court's interpretations of that treaty.

This court is not construing the Treaty found in *Puyallup*, though. In that treaty, the operative language read:

[471 F Supp 270]

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, ...

The United States secured the right of non-Indians to fish alongside the Indians. The Indians' right of taking fish in that Treaty is explicitly shared with the citizens of the state, and it is this aspect which may have led the Supreme Court to conclude that the state police power is applicable to both parties.

This language is not contained in the Treaty of 1836. The Indians' aboriginal rights and Treaty of Ghent rights to fish in the Great Lakes is not shared with non-Indians through treaty provision. Consequently, this court holds that the State of Michigan does not have any right to regulate Ottawa and Chippewa Indian fishing on the Great Lakes in exercise of their rights, because the Treaty of 1836 and the Treaty of Ghent do not permit state regulation of these Indian fishing rights.

2. *The State's Power to Affect Treaty Right Fishermen is Preempted by Federal and Tribal Regulation.*

In this case state regulation has been preempted not only by virtue of the treaties, but by virtue of federal regulation and Indian self-regulation as well.

In 1967, the Secretary of the Interior took steps to implement the exercise of treaty rights to fish when he enacted 25 C.F.R. Part 256. These regulations are detailed and explicit and provide a means by which off-reservation fishing rights may be regulated in order to meet conservation goals. This provision gives full deference to tribal rights as opposed to state regulation, for it takes into account state regulations only insofar as they govern "persons not fishing under treaty rights." A state may itself initiate the regulatory procedure via a request from its governor. The State of Michigan has thus far ignored this federally-sanctioned approach to the very type of regulation which it purports so ardently to desire. The Secretary is presently operating under these regulations since he has issued tribal identification cards to treaty right fishermen which are signed by both tribal and federal officials. Here again, the federal government, acting in cooperation with the tribes, occupies the field of regulating treaty right fishermen, thereby preempting state regulation over these same persons.

Part 256 of 25 C.F.R. is the very sort of pervasive federal regulation which was found to preempt state jurisdiction in *Warren Trading Post* v. *Arizona Tax Com'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In that case the United States Supreme Court held that the federal government had promulgated such a pervasive system of regulation of retail trading on Indian reservations that no room was left for any state regulation. On its way to this conclusion the court said: "[F]rom the very first days of our Government, the Federal

Government had been permitting the Indians largely to govern themselves, free from state interference." 380 U.S. at 686-87, 85 S.Ct. at 1243. The federal regulation found in 25 C.F.R. Part 256 is hardly less pervasive than that found in *Warren Trading Post*. Moreover, unlike the regulation of retail trading on Indian reservations, here the federal government has specifically provided a means by which a state may participate, should it so desire. It is clear, therefore, that the federal government has preempted state regulation of off-reservation Indian fishing rights secured by treaty. Unfortunately, the state consistently refuses to accept the principle that treaty tribe fishermen enjoy unique rights derived from federal law and, therefore, are not subject to the rules and regulations governing citizens who do not enjoy such rights. The State maintains simplistically that a disparity of treatment between Indian fishermen and citizens fishing as a matter of privilege under state law would constitute unlawful discrimination prohibited by the Fourteenth Amendment. If the state were correct, however, Indian fishermen would derive nothing from their treaty. Indeed, it would be as if there were no treaty at all.

[471 F Supp 271]

The Supreme Court rejected the State's discrimination contention long ago, but reiterated it recently in *Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The issue there concerned the constitutionality of a federal law affording job preference within the Bureau of Indian Affairs to Native American applicants. The Court said:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and

> explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

417 U.S. at 552, 94 S.Ct. at 2483-2484. Clearly then there are no constitutional impediments to treating Indian fishermen differently than other state citizens. To the contrary, the Supremacy Clause mandates different treatment because Indian fishermen derive their rights (not privileges) under federal law.

Relying upon a similar claim of denial of equal protection, fishermen licensed by the State of Michigan would on the basis of their payment of an annual $5.25 fee, assert a right to preempt the Indian fishing right proclaimed here, a right acquired over a period of 12,000 years. From the evidence received by this court, during the entire period for which the Indians alone exploited the Great Lakes, there was no diminution of the fishery, no need to replenish it by artificial means nor any anxiety to stock it with unnatural species. These are the conditions which the fee is intended to address. The licensed fishermen would obliterate the Indians' record, appropriate their rights and conquer them anew by paying yearly dues of five dollars, so long as they are interested in participating in despoiling the Indians. Under the proposed theory, so long as someone is interested in paying the fees, the Indians' right to fish is accordingly limited.

A comparison might be made to bring this theory into relief. By the treaty of cession, the state received deposits of oil and natural gas. Under the system by which these resources are administered, the average household in this state pays many hundreds of dollars a year to acquire an allotment of these resources. Yet, no one appears to be so bold as to assert that

by virtue of his payment he alone, or he in conjunction with others, acquires a right to exploit the resource, a right which is superior to the rights of utility companies and the state acquired by purchase or cession. The state admittedly owns the resource. It is peculiar, then, to hear of a supposed interest in the fish which arises by paying a minimal fee and which forecloses the rights of the prior owner of the right to exploit the resource, an owner who acquired his interest not by virtue of purchase or cession, but by "the Laws of Nature and of Nature's God."

Sportsmen and non-Indian commercial fishermen cannot raise the issue of equal protection without showing entitlement founded upon use and occupancy similar to that of the Indians. But the white man is a late comer to the Great Lakes fisheries when it is considered in the light of centuries. Payment of an annual fee is not a sufficient predicate to permit an abridgment of the Indians' right to fish. This case is not an equal protection case under the Fourteenth Amendment or the Declaration of Independence; it is an Indian treaty case, supplemented with a full panoply of aboriginal rights acquired and preserved over the centuries and existing in full to the present.

The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members. *United States* v. *Washington*, 520 F.2d 676 (9th Cir. 1975); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); *United States* v. *Three Winchester*

[471 F Supp 272]

30-30's, 504 F.2d 1288 (7th Cir. 1974); *Whitefoot* v. *United States*, 293 F.2d 658, 155 Ct.Cl. 127 (1961); *Montana Power Co.* v *Rochester*, 127 F.2d 189 (9th Cir. 1942). The right is presently exercised by the plaintiff tribes under extensive tribal regulation which preempts state regulation.

Both Bay Mills and the Sault Tribe have adopted constitutions and by-laws under the Indian Reorganization Act of 1934. (Tr. 1060, 1127; Ex P-119, 120.) Both constitutions authorize the tribes to regulate and protect resources under their control. Further, both constitutions authorize the tribes to regulate the internal relations of their members. Pursuant to the constitutions and by-laws, the tribes have developed conservation codes and fishing regulations. (Tr. 1080, 1139; Ex. P-162, 163, 165.) Pursuant to this constitutional and ordinance authority, the treaty fishing activities of the Indians in the area ceded by the Treaty of 1836 are comprehensively regulated and enforced.

Federal law provides that Indian tribes retain the inherent sovereign right to regulate and enforce the internal affairs of their members, including hunting and fishing rights. *United States* v. *Wheeler, supra; McClanahan* v. *Arizona Tax Com'n, supra* 411 U.S. at 173, 93 S.Ct. 1257; *United States* v. *Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *Byran* v. *Itasca County, supra* 426 U.S. at 388, 96 S.Ct. 2102; *Williams* v. *Lee, supra* 358 U.S. at 221-22, 79 S.Ct. 269; *Menominee Tribe* v. *United States, supra* 391 U.S. at 409-10, 88 S.Ct. 1705; *United States* v. *Washington, supra* at 520 F.2d 686; *Settler* v. *Lameer, supra* at 237; and *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

In *United States* v. *Wheeler, supra*, the United States Supreme Court stated:

The powers of Indian tribes are, in general "*inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1941) emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. *See McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164, 172, 93 S.Ct. 1257, 36 L.Ed.2d 129. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States* v. *Kagama*, supra, [118 U.S. 375] at 381, 6 S.Ct. 1109, 30 L.Ed. 228. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that "*Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory* . . . . [They] are a good deal more than 'private, voluntary organizations,'" *United States* v. *Mazurie*, 419 U.S. 544, 577, 95 S.Ct. 710, 42 L.Ed.2d 706; *see also Turner* v. *United States*, 248 U.S. 354, 355, 39 S.Ct. 109, 65 L.Ed. 291; *Cherokee Nation* v. *Georgia*, *supra*, [5 Pet. 1] at 16-17, 8 L.Ed. 25. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

> *In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.*

435 U.S. at 322, 323, 98 S.Ct. at 1086, 55 L.Ed.2d at 312-13 (emphasis supplied) (footnote omitted). Similarily, in *Williams* v. *Lee*, the Supreme Court observed:

> Implicit in these treaty terms as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia*, was the under-

[471 F Supp 273]

> standing that *internal affairs* of the Indians remained exclusively within the jurisdiction *of whatever tribal government existed.*

358 U.S. 221-22, 79 S.Ct. (emphasis supplied).

The Ninth Circuit Court of Appeals in *Settler* v. *Lameer*, *supra*, dealt expressly and in detail with the question of tribal control over fishing rights which under the tribe's treaty allowed members to travel great distances from their reservation to fish in common with citizens of the State of Washington. The Ninth Circuit agreed with the Indians that included within their treaty right to fish was tribal authority to control and regulate its members fishing off its land reservation.

> This conclusion is supported by the nature of the fishing rights. As set forth in *Whitefoot*, *supra*, 293 F.2d at 663, the fishing rights reserved in the Treaty of 1855 are communal rights of the Tribe, even though the individual members benefit from those rights. *The determination of when and how the rights may be exercised is an "internal affair" of the Tribe. As the district court correctly pointed out, "One of the last remnants of sovereignty re-*

> *tained by the Yakima Indian Tribe is the power to regulate their internal and social relations.*"

507 F.2d at 237 (emphasis supplied).

Subsequently, the Ninth Circuit in *United States* v. *Washington, supra,* confirmed the authority of Indian tribes to control the internal relations of their members, including the exercise of treaty fishing rights:

> Preservation of fishery resources is of vital importance to Indians as well as to other citizens. *At the same time, regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes.* These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites. *Settler* v. *Lameer,* 507 F.2d 231 (9th Cir., 1974).

520 F.2d at 686 (emphasis supplied).

In so holding that Indian tribes have the power to regulate the treaty fishing activities of their members and to enforce those regulations through arrest and seizure of equipment, the Ninth Circuit determined that the right to fish retained by the Indians in the Treaty with the Yakima (12 Stat. 951) was understood by them to include the power to control the exercise of that right through tribal regulation of members:

> We conclude that by the Treaty of 1855 the Yakima Indian Nation retained regulatory and enforcement powers with respect to tribal fishing at all "usual and accustomed places" off the reservation. No act of Congress, including the Washington Enabling Act, 25 Stat. 676 (1889), has qualified these reserved powers. The powers therefore continue to exist.

Settler v. *Lameer, supra,* 507 F.2d at 239.

The court was also concerned with the effect upon the fishery resource if tribal self-regulation did not exist:

> The Yakima Nation may be in a better position than the State of Washington to regulate off-reservation fishing. The Tribe possesses the knowledge of its individual members and their fishing sites, and only the Tribe has the authority to revoke a Tribal member's fishing privileges.

Id. at 240, n. 21.

> In view of the strict limitation on the power of the state to regulate Indian off-reservation fishing, there would be no effective regulation and enforcement of a broad range of fishing activities if enforcement powers are denied to the Tribe.

Id. at 239, n. 18.

The right of the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians to regulate the off-reservation treaty fishing activities of their members was not given up when the Indians signed the Treaty of 1836. As cited *supra,* the law of treaty construction is clear that rights not expressly relinquished in the treaty are retained by the Indians. The tribes have asserted their right to regulate by promulgating fishing regulations and enforcing them.

[471 F Supp 274]

The right of the treaty tribes herein to regulate tribal members fishing in the area ceded by the Treaty of 1836 is no less than the rights of Indians elsewhere. The courts have been careful to preserve treaty rights even when the lands ceded were later privately owned, so long as the interests of private

landowners are not ignored. For example, in *Kimball* v. *Callahan, supra,* the court held that the Klamaths may exercise:

> . . . treaty hunting, trapping and fishing rights free of state fish and game regulations on lands constituting their ancestral Klamath Indian Reservation, including that land now constituting United States National Forest land and that privately-owned land on which hunting, trapping or fishing is permitted.

493 F.2d at 569-70. And in *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F.Supp. 1001 (D.Minn. 1971), the court found that the Indians have the "right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws." Similarly, in *State* v. *Tinno, supra,* Chief Justice McQuade, concurring, specially said:

> . . . the fishing right was reserved by treaty to protect a source of tribal subsistence and to preserve an integral part of the native American culture. These purposes may be given meaningful effect in 1972, when many fishing streams have been dammed, depleted or polluted, only if the treaty is interpreted liberally to extend to any unoccupied federal land where fishing opportunities remain.

497 P.2d at 1395.

Both Bay Mills' and the Sault Tribe's treaty rights include the power to regulate their members so long as they are fishing under tribal regulation and in the area ceded by the Treaty of 1836. Both tribes presently exercise that power and regulate the fishing activities of their members. This regulation preempts any state authority to regulate the fishing activity of the tribal members.

Under the Supremacy Clause of the United States Constitution, state regulation of Indian fishing rights secured by the treaties here in question, and implemented by Federal and tribal regulations, is preempted. Any regulation must be by Congress or Congressional authorization. Any different understanding of the Supremacy Clause, that part of the Constitution which governs the relationship between the states and the federal government and makes our system of interrelated state and federal governments possible, must come from the Supreme Court. That Court presently has before it several cases growing out of *United States* v. *Washington, supra.* These cases could revise the present understanding of the Supremacy Clause as related to Indian treaties. Under the law as it presently stands, only Congress has the power to regulate Indian treaty right fishing in the areas of the Great Lakes covered by the treaties before this court.

J. *The Submerged Lands Act Did Not, as a Matter of Law, Repeal by Implication the Indians' Treaty Fishing Rights.*

Amicus MUCC argued that Congress *sub silentio* abrogated the Indians' treaty fishing right by the passage of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* This Act was not intended to, nor did it have, such an effect.

The Submerged Lands Act does not expressly deal with Indian fishing rights. Any abrogation of Indian fishing rights would be by implication. The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Menominee Tribe* v. *United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

The impetus behind the Submerged Lands Act seems to have been several Supreme Court cases holding that off-shore oil belonged to the federal government rather than to the individual states. *United States* v. *Texas,* 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950); *United States* v. *Louisiana,* 339

U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); *United States* v. *California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889

[471 F Supp 275]

(1947). The Act restored the rights to the submerged land and its resources to the individual states.

The specific language of the Submerged Lands Act gives title to and ownership of "the submerged lands," and the "Natural resources within such lands and waters," and "the right and power to manage, administer, lease, develop, and use the said land and natural resources" to the states. At one time legal opinion had held that the states held title over this off-shore land and resources, but the Supreme Court held otherwise in *United States* v. *California, supra.* Thus, this legislation "recognized, confirmed, established and vested in and assigned to the respective states" the rights to the submerged lands. In essence the Act said that the federal government recognized the states' interests if they had such interests, and gave the states those interests if they in fact had none under prior law.

The definition of natural resources contained in the Submerged Lands Act includes fish. 43 U.S.C. § 1301(e). However, natural resources such as oil and minerals were the main target of the legislation. Biological resources were included in the definition by Congressmen who were worried that traditional state regulation of the ocean shrimp, lobster, and clam industries, etc., would be adversely affected unless these items were also included within the definition. Legislative history reveals that the inclusion of fish in the definition of "resource" is strictly a secondary consideration of the Act. 2 *U.S. Code Congressional and Administrative News,* (1953) at 1385.

A recent Supreme Court case, *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977), re-established important principles while considering this act. Before the Court in that case were laws enacted by the State of Virginia governing the commercial taking of fish within its waters. Those laws required that persons seeking licenses be citizens; that corporations seeking licenses be owned 75 percent by citizens; and placed certain restrictions on non-residents. Seacoast claimed the state laws did not limit its right to fish commercially in Virginia waters because it was a licensed United States flag ship pursuant to federal law and that under the Supremacy Clause of the Constitution, Virginia's prohibition against its fishing in state waters could not stand.

The Court first looked to federal law to determine the rights granted to Seacoast. It ruled that Seacoast had a federal license to carry on a fishing business in Virginia waters. Because state law conflicted with federal statutes, the former could not prevail under the Supremacy Clause.

The state argued that the Submerged Lands Act required a different result. The court conceded that the state has the right to manage lands beneath navigable waterways and has title to those lands, but nonetheless ruled against the state:

> But when Congress made this grant [ownership of the lakebeds] pursuant to the Property Clause of the Constitution, it expressly retained for the United States "all constitutional powers of regulation and control" over these lands and waters for purposes of commerce . . .. Since the grant of the fisheries license is made pursuant to the Commerce power, the Submerged Lands Act did not alter its pre-emptive effect. Certainly Congress did not repeal by implication, in the broad language of the

> Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licenses.

Douglas v. *Seacoast Products, Inc., supra* at 284, 97 S.Ct. at 1751 (citations omitted). This case is significant for several reasons. First, it reaffirms the obvious—the Supremacy Clause as a matter of constitutional obligation requires the state to refrain from interfering with a federal right. Second, it reaffirms the well-established notion that abrogations by implication are not favored. In *Seacoast, supra,* the court refused to rule that the 1953 Submerged Lands Act repealed by implication the 1792 Licensing Act.

The present case involves a federal right established by treaty. Under the Supremacy Clause the state may not interfere

[471 F Supp 276]

with such a federal right. Section 1313(b) of the Submerged Lands Act speaks of lands or interests held therein for the benefit of Indians and excludes these lands from the operation of the Act.

> [There is excepted from this grant:]
>
> > (b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians;

MUCC assumes that fishing rights are not interests in land and argues that the exclusion of the rights mentioned by 1313(b) is an inclusion of all other rights within the operation of the Act. Granting this assumption, the argument is not persuasive. This section merely reflects the principle concern of the Act—title to submerged land and the oil and other

resources it contains. The Act was intended to restore submerged, off-shore land and its resources to the states, thereby effectively reversing *United States* v. *California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). Neither the language of the Act nor its purposes are in conflict with the Indians' retention of fishing rights. The state may own the resources of these lands, even the fish, but this does not necessarily abrogate the Indians' right to fish. *Seacoast Products* makes clear that a federal license to fish does not interfere with the state's rights.

However, it does not appear necessary to grant the assumption. If not, the Indian rights asserted here are within the terms of the exclusion. Indian title to lands has never been a fee; it has always been a right to use and occupy lands claimed by the United States. This interest in land gives the tribes holding it the right to fish, hunt, gather fruits and cross the land. It is analogous to a profit a prendre or an easement. *Winans* v. *United States, supra.* The Indians reserved such an interest in land by the Treaty of 1836. If this is so, then this interest is excluded from the conveyance of the Submerged Lands Act by the terms of that Act.

If this court had any hesitation in determining whether the Submerged Lands Act abrogated the Indians' fishing right, it would be overcome by the fact that an even stricter standard than was used in *Seacoast* must be applied to legislation purporting to abrogate Indian treaty fishing rights. *See Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Menominee Tribe* v. *United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); *Squire* v. *Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956); *Pigeon River Improv. Slid & B Co.* v. *Cox*, 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695 (1934); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974). In *Menominee Tribe*, supra, the statute which as-

sertedly abrogated the treaty fishing right dealt specifically and drastically with the tribe by abolishing the federal existence of the very entity which held the fishing right. Nevertheless, the Court held that individual Indians continued to possess the right to hunt and fish on their ancestoral lands. The repeal by implication was not made out, even where the legislation directly affected the particular tribe in question. The Submerged Lands Act only remotely relates to the subject of Indian fishing rights and does not approach the standard which must be met to establish abrogation of an Indian treaty right. As is *Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), where the issue was whether the Civil Rights Act amendment of 1972 prohibiting discrimination in the federal government implicitly abrogated an earlier federal statute giving hiring preference to Indian applicants for employment in the Bureau of Indian Affairs, the later statute was "designed to deal with an entirely different . . . problem [from the Act argued to be repealed]. Any perceived conflict is thus more apparent than real." 417 U.S. at 550, 94 S.Ct. at 2482.

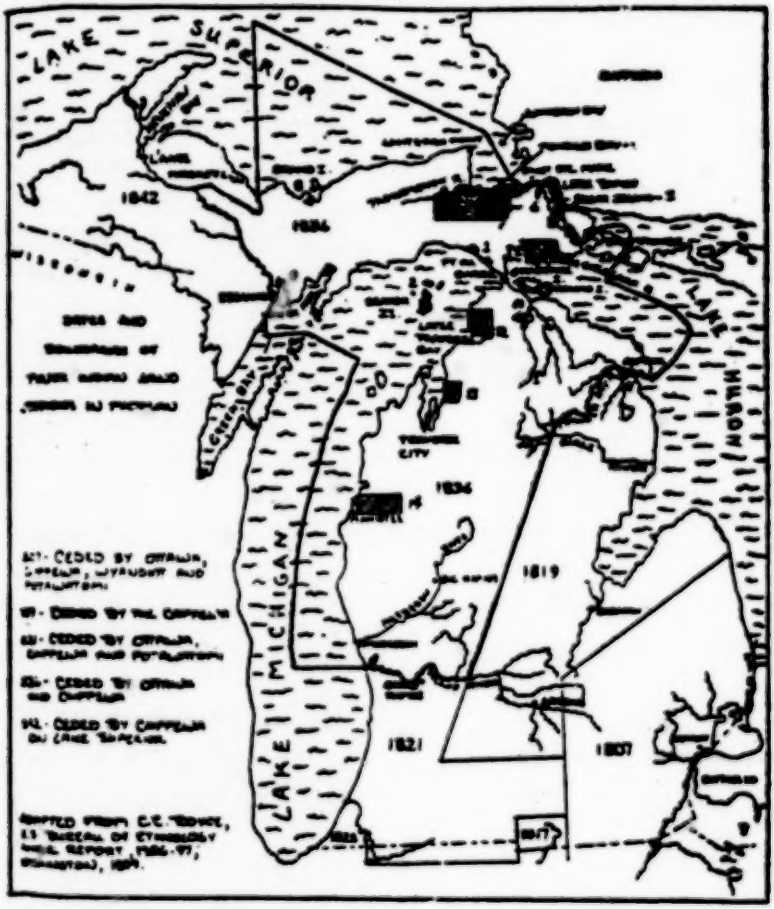
EPILOGUE

Justice is a virtue which cannot be exercised apart from love of neighbor. Love is, indeed "superior" to justice. At the same

[471 F Supp 277]

time love of neighbor proves itself in the form of justice. If justice is weakened, love itself is jeopardized. No man can profess to adhere to the greatest of all commandments—Love thy neighbor—if he should visit violence upon fellow men who would exercise centuries-old fishing rights which have been recently confirmed, little more than 150 years ago, and again 130 years ago, by most solemn promise our nation.

APPENDIX 1



RESERVATIONS OF THE OTTAWA AND CHIPPEWA OF MICHIGAN TREATY OF MARCH 28, 1836

[471 F Supp 278]

DECLARATORY JUDGMENT AND DECREE

This judgment and decree are based upon the Findings of Fact, Conclusions of Law and Opinion of the Court entered in this case, all of which by this reference are hereby made a part hereof as though set forth herein. No language herein shall be interpreted as superseding the Opinion of the Court, which shall control if in any respect it appears to be in conflict with any Finding herein.

It is hereby ORDERED, ADJUDGED AND DECREED that the right of the Plaintiff tribes to fish in the waters of the Great Lakes and connecting waters ceded by the Treaty of 1836, 7 Stat. 491, is as follows:

(1) Each of the Plaintiff tribes, the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians, is a present-day tribal entity which, with respect to the matters which are the subject of this litigation, is a political successor in interest to the Indians who were party to the Treaty of Ghent and the Treaty of 1836. Their members can trace their ancestory to the Indians who were beneficiaries of the Treaty of Ghent of 1814, 8 Stat. 218, and the Treaty of 1836. Members of these tribes and their predecessor bands and the individual ancestors of their members have fished the ceded waters of the Great Lakes under claim of aboriginal right, Treaty of Ghent and Treaty of 1836 right from ancient times until the present.

(2) The Indians who comprised the Ottawa and Chippewa bands which were signatories to the 1836 treaty occupied the ceded territory of Michigan for centuries. They lived off the fruits of the land, continuing the dependence of Upper Great Lakes Indians upon the Great Lakes fishery dating back sev-

eral thousand years. The culture, subsistence and livelihood of these Indians centered around and depended upon the Great Lakes fishery. In the spring the Indians would gather in large fishing villages of around 200 persons, where they would remain until the onset of winter. These villages were on the shores of the Upper Great Lakes in locations with convenient access to productive fishing grounds. Fish comprised up to sixty-five percent of the usable meat in the Indians' diets at these times. In winter the villages would break up into small family groups which would disperse inland to hunt. Various species of fish were taken depending upon the season and the method of fishing. Fishing took place throughout the ceded area, wherever the fish were to be found.

(3) The Indians' participation in the fishery of the ceded area evolved over time. The fishery was transformed when nets and gill nets became available at about the time of the birth of Christ. When the European market economy arrived, the Indians quickly adapted their fishing skills to serve it. Especially after the decline of the fur trade, fishing was the principal means of making a living and participating in trade with the non-Indians. Long before the Treaty of 1836 commercial fishing took place throughout the treaty area, including the Whitefish Bay area, the Sault Rapids, the Michilimackinac area, and various other places in the Northern lower peninsula and lower Lake Superior. Indian participation in and dependence upon commercial and subsistence fishing continued throughout the 19th century, and remains important today.

(4) By virtue of their joint and amicable occupation of the land and water area ceded by the Treaty of 1836, the Ottawa and Chippewa Indians of Michigan possessed aboriginal rights to occupy and use this area. By virtue of their use of the fishery of the Great Lakes and their connecting waters, the Ottawa and Chippewa bands, signatory to the Treaty of 1836, possessed an aboriginal right to fish in those waters for sub-

sistence and commercial purposes. The United States and Britain recognized their sovereignty over these lands was limited by the Indians' aboriginal right to use and occupy these lands. The United States expressed this in the Northwest Ordinance and acknowledged an obligation not to take Indian lands or property without the Indians' consent. The consent was to be accepted by the United States with the utmost good

[471 F Supp 279]

faith, justice and humility. The right of the Ottawa and Chippewa Indians to fish in the Great Lakes and connecting waters, along with their right to occupy and use the area generally, was expressly guaranteed to them by the United States in the 1814 Treaty of Ghent. At the time of the Treaty of 1836, they possessed both aboriginal and treaty-guaranteed rights to fish for subsistence and commercial purposes in the waters of the Great Lakes and connecting waters.

(5) The United States was aware, when it negotiated the Treaty of 1836, that the Indians of the treaty area depended upon subsistence and commercial fishing for their existence and livelihood. The United States intended that the Michigan Indians be able to fish in order to maintain their livelihood and way of life then and in the future. By the treaty the Indians ceded certain rights to the United States, and reserved all rights not ceded. The Indians ceded to the United States a tract of country, including area of the Great Lakes belonging to them, described in the treaty. They excepted from this cession and reserved for themselves certain land reservations. The United States did not negotiate for, nor did it obtain, the Indians' right to fish off-reservation in the ceded area. The Indians implicitly reserved and retained their right to fish. This right is confirmed by the Treaty. The right is further protected by Article Thirteenth of the Treaty, which stipulates for the "usual privileges of occupancy."

(6) The Indians understood that they would have to accommodate the exercise of their right to hunt on the ceded lands to the rights of settlers on the ceded land. They understood that they could continue to use the land to the extent necessary to continue to live their lives as before. By the terms of the treaty, specifically the retention of exclusive rights to fish in each of the areas where whitemen had previously sought fishing rights, they were led to believe—consistent with the intention of the United States—that they would not have to accommodate with settlers in the exercise of their fishing rights.

(7) The Indians understood the limiting language of Article Thirteenth—"Until the land is required for settlement"—to mean that Indians could continue to exercise their fishing right for as long as Indians lived in Michigan. The phase is ambiguous as to the term of permissible occupancy and can only be enforced as it was understood by the Indians. The United States inserted the clause into the Treaty only because it wanted to insure settlers access to particular plots of land. The limitation was not intended to affect Indian fishing. It is not possible to "settle" the Great Lakes and their connecting waters.

(8) The Indians assented to the Senate Amendment to Articles Second and Third because of the assurance that they could use their ceded territory indefinitely or so long as Indians lived in Michigan. The United States subsequently granted the Indians permission to remain on their reservations beyond the five year limitation. The land reservations remained in existence until new land reservations were provided for in the Treaty of 1855.

(9) The Removal Act of 1830 did not mandate that the Executive secure removal of Indians to lands west of the Mississippi. Nor did it authorize violation of prior Indian

treaties. It merely made United States lands available for effecting Indian removal. It left the choice of whether to remove to the Indian tribes.

(10) The 1836 Treaty was not a removal treaty. It merely provides for possible removal. Treaty commissioners were providing for a future contingency, in the event the Indians chose to remove, a contingency which was actually inconceivable to the Michigan Indians. The commissioners were not attempting to ensure that removal would take place at some particular time. Neither the United States nor the Indians understood the treaty to be a removal treaty. The Indians clearly understood that they were under no obligation to remove. They denied any obligation to investigate proposed lands west of the Mississippi, and, when the time came for an exploring party to visit these lands, they only sent representatives who lacked authority to accept the lands for the tribes. The purported acceptance of the lands by these representa-

[471 F Supp 280]

tives was only for those "who might personally chose to remove."

(11) The Senate amendment to Article Eighth of the Treaty merely eliminated the option of removal to an area in Minnesota which might have been considered by the Michigan Indians. It was another amendment introduced by Senator Hugh White to embarrass President Jackson.

(12) Neither the federal government nor the Indians took any steps toward removal after the return of the exploring party from the Osage River area. Any attempt to effect the removal of the Michigan Indians was tacitly abandoned soon after the party returned and was officially abandoned in the Treaty of 1855. No Indian of the treaty area ever removed west of the Mississippi River.

(13) The Treaty of 1855 (11 Stat. 621) was negotiated to provide permanent homes for the Ottawa and Chippewa in Michigan and to settle and consolidate monies and services owed to the Indians under previous treaties and in particular the Treaty of March 28, 1836. Article Three of the treaty released legal and equitable claims of the Indians against the United States. These claims were financial. The Indians' right to fish was not a legal or equitable liability of the United States nor was it even discussed during the negotiations. Article Three operated to release the United States from promises previously made to the Indians, but not fulfilled. The United States could not be released from a right originating in the Indians which it never owned and could never give. The clause has no impact on the fishing right the Indians possessed before the treaty.

(14) Article Five of the Treaty of 1855 ended an artificial construction—the Ottawa and Chippewa Nation—which the United States had created in order to obtain the cession of 1836. It did not result in any change in the way in which the Indians of the treaty area functioned politically or in the way in which they were dealt with by the federal Indian agents, save one: they were never again convened or dealt with as one entity, not even to assent to the Senate amendments to the treaty. To the Indians the article meant only that they would not be considered a single entity. The termination of this entity, not the termination of the Ottawa and Chippewa tribes or bands, was all that was accomplished by this Article.

(15) Nothing in the Treaties of July 31 and August 2, 1855, 11 Stat. 621, et seq., abrogated, alienated, surrendered, granted away, extinguished or otherwise diminished the fishing right affirmed by the Treaty of Ghent and reserved by the Treaty of 1836.

(16) The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the bands which signed the treaty. Their modern political successors, plaintiffs in this action, presently hold the right. It does not belong to individual tribal members who exercise it, although the rights were reserved for every individual Indian, as though named in the treaty. It is exercised by members of the plaintiff tribes under extensive tribal regulation. Both Bay Mills and the Sault Tribe retain the power to regulate their internal affairs and have adopted constitutions and by-laws under the Indian Reorganization Act of 1934. Both constitutions authorized the tribes to regulate and protect resources under their control. Further, both constitutions authorize the tribes to regulate the internal relations of their members. Pursuant to the constitutions and by-laws, the tribes have developed conservation codes and fishing regulations. Pursuant to this constitutional and ordinance authority, the treaty fishing activities of the Indians of the plaintiff tribes are comprehensively regulated and enforced.

(17) The mere passage of time has not eroded, and cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians have a right to fish today wherever fish are to be found within the area of cession—as they had at the time of cession—a right established by aboriginal right and confirmed by the Treaty of Ghent, and the Treaty of 1836. The right is not a static right today any more than it was during treaty times. The right is not limited as to the species of fish, origin of fish, the purpose of use or the time or manner of taking.

[471 F Supp 281]

It may be exercised utilizing improvements in fishing techniques, methods and gear.

(18) Because the right of the Plaintiff tribes to fish in ceded waters of the Great Lakes is protected by treaties of the Ottawa and Chippewa Indians with the United States, that right is preserved and protected under the supreme law of the land, does not depend in State law, is distinct from the rights and privileges held by non-Indians and may not be qualified by any action of the state or its agents nor regulated by the state or its agents except as authorized by Congress. Congress has not authorized the state or its agents to regulate the exercise of the treaty fishing rights of the Indians of Michigan. To the extent that any laws or regulations of Michigan are inconsistent with the treaty rights of the Michigan Indians, such laws and regulations are void *ab initio* and of no force and effect as to the plaintiff tribes and their members.

(19) The State has always lacked authority to arrest and prosecute Indians for violation of its statutes governing fishing, and lacks authority to maintain records of such arrests and prosecutions. It is the duty of the state to expunge such arrests and prosecutions. It is the duty of the state to expunge such records, cease such enforcement and to provide such relief, including payment of damages and expenses, as may be necessary to make the affected Indians whole.

(20) The Secretary of the Interior has taken steps to implement the exercise of treaty rights to fish under 25 C.F.R. 256. This pervasive federal regulation provides a federally-sanctioned approach for state involvement in treaty-right fishing regulation and preempts independent state regulation.

(21) Regulation of treaty-right fishing by the plaintiff tribes preempts any state authority to regulate the fishing activity of the tribal members. The state lacks authority to enforce its police power regulations against members of the plaintiff tribes.

(22) The Submerged Lands Act does not repeal by implication the Indians' treaty fishing rights.

(23) It is the responsibility of all citizens to see that the treaty-protected rights of the plaintiff tribes are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

(24) All Findings of Fact and Conclusions of Law pertinent to the nature, scope and effect of the fishing rights of the treaty Indians are specifically incorporated by reference herein.

(25) The court retains jurisdiction of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law, and in the implementation of this decree.

(26) Plaintiffs' application for an injunction will be considered and determined upon hearing thereof at the earliest practicable date following entry of this judgment and decree.

RECEIVED SEP 22 1979

79-1414

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees V. STATE OF MICHIGAN, et al., Defendants and GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, Intervenor-Appellant	

ORDER

For the reasons set forth in a memorandum opinion filed concurrently herewith,

IT IS ORDERED that the judgment of the United States District Court for the Western District of Michigan, Northern Division, in *United States v. State of Michigan*, District Court File M26-73 CA, entered September 17, 1979, is stayed for a period of thirty days from and after the date hereof, unless otherwise ordered by this court.

IT IS FURTHER ORDERED that the application for stay filed herein by Grand Traverse Area Sport Fishing Association be referred within that period to a three-judge panel of the court for further consideration pursuant to Rule 8, Federal Rules of Appellate Procedure.

Albert J. Engel /s/
Albert J. Engel, Circuit Judge

Dated: 7:00 p.m. September 20, 1979

79-1414

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees V. STATE OF MICHIGAN, et al., Defendants and GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, Intervenor-Appellant	

MEMORANDUM OPINION

This matter is once more before the undersigned upon a motion for a stay of an order entered by the district court restraining further prosecution of an action brought by the Grand Traverse Area Sport Fishing Association in the 13th Judicial Circuit Court for the State of Michigan.

In an earlier application, the Association sought to stay a temporary restraining order issued by the district court. Because it clearly appeared that the order then appealed from, a Temporary Restraining Order, was not appealable, the motion was summarily denied.

Since the earlier application for stay, the district court has conducted an accelerated hearing pursuant to Rule 65(a)(2)

Fed. R. Civ. P., and has entered a final judgment by way of a permanent injunction. The district court's order forbids the judges of the 13th Judicial District of Michigan from proceeding any further in the state action started by the Grand Traverse Area Sport Fishing Association against Clarence Maudrie, et al. The court's order more particularly enjoins the state judges from enforcing the *ex parte* restraining order which had earlier been issued in the State cause restraining the named defendants therein, six of whom at least are of Indian heritage, from the gill net fishing of lake trout in the waters of Lake Michigan south of a line running due east from the Grand Traverse Light Station to a point near Norwood, Michigan, commonly described as zone MM-4.

The earlier impediment to the relief requested in the Association's first application has now been removed by the entry of a final judgment granting a permanent injunction. While the Grand Traverse Area Sports Fishing Association is not in fact a named defendant in the underlying district court action, and the injunction by its terms does not name the Association, the district court has specifically recognized the interest of the Association to the extent at least of granting its application for intervention for the purposes of this appeal.[1] The Association's stake in the outcome of the instant litigation is apparent, for its state court action has been directly frustrated.

Whether the defendants in the state court action are amenable to state law forbidding gill netting will in all likelihood ultimately hinge upon whether the district court was correct

---

[1]

See Joseph Skilliken & Co. v. City of Toledo, 528 F. 2d 867, 874 (6th Cir. 1975); *Hobson v. Hansen*, 44 F.R.D. 18 (D.C. D.C. 1968); and *Wolpe v. Poretsky*, 144 F. 2d 505 (D.C. Cir. 1944).

in holding that such activity is protected by federal treaty rights to the exclusion of all state regulation. *See United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979). The State of Michigan has filed an appeal from the judgment of the district court entered in the principal litigation but has not in the meantime sought any stay of that judgment.

Essentially what the Association now asks of the undersigned is a stay pending its appeal from the permanent injunction forbidding any further proceedings in the state circuit court action. Although the state court action is ostensibly directed at obtaining a determination that state environmental protection law forbids the gill netting operation complained of (which well it may), the district court has ruled that any such state law must in all events yield to the rights which it has found were guaranteed to those same defendants by federal treaty with the several Indian tribes affected. However, the extent to which states may, even in the face of treaty rights granted the Indian defendants, regulate the size and the amount of the catch of fish or the means employed to catch them in order to preserve the species is, at this posture of the appeal, uncertain.

In *State of Washington* v. *Washington State Commercial Passenger Fishing Vessel Association, et al.*, decided July 2, 1979, 47 U.S.L.W. 4978, and heavily relied upon by the district court here, Mr. Justice Stevens, while clearly recognizing that the Supremacy Clause protects the rights of Indians secured by treaties with the United States from judicial interference, also acknowledges at least a limited power in the state, recognized in *Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392 (1968), "to impose non-discriminatory regulation on treaty fishermen 'so long as they were necessary for the conservation of the various species' ". *State of Washington, et al* v. *Washington State Commercial Passenger Fishing Vessel, supra*, 47 U.S.L.W. at 4984. In particular

the Supreme Court quoted with approval the statement of Mr. Justice Douglas on *Puyallup, supra,* (Puyallup I), that "The right to fish 'at all usual and accustomed' places may not be qualified by the State . . . but the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians". 47 U.S.L.W. at 4984 n. 25, quoting from *Puyallup I, supra,* 391 U.S. at 398.

Mr. Justice Douglas, in *Puyallup I,* in turn relied upon an earlier decision, *Tulee* v. *Washington,* 315 U.S. 681 (1942), observing that the time and manner of fishing, where not defined or established by treaty, were within the reach of state power to the extent that such was "necessary for the conservation of fish". *Puyallup I, supra,* 391 U.S. at 401.

Without endeavoring in any way to pass judgment upon the ultimate merits of the underlying litigation, and recognizing the immense amount of research and work which has been put into the extensive opinion of the district court in *United States* v. *State of Michigan,* 471 F. Supp. 192 (W.D. Mich. 1979), I draw the conclusion that in all events, the issues raised in this appeal are substantial. The substantiality of the instant appeal is further enhanced by the fact that the district court's injunction runs directly against a court of the State of Michigan which, I am now informed, has itself filed a notice of appeal from the judgment complained of.[2]

The Association's efforts to appeal and its application for stay pending an appeal are substantially impeded in a prac-

---

[2]

The government correctly points out, however, that since a temporary restraining order had already been issued by the circuit court, an injunction running only against the Association would have been ineffective.

tical way by the failure of the State of Michigan, for reasons of its own, to seek any stay of the judgment in the principal federal litigation, although appealing that judgment on the merits. This circumstance nevertheless lends some support to the argument made by the Association that its interests are neither identical to the interest of the state itself, nor are they fully and adequately represented by the Attorney General of Michigan.

The Federal Rules of Appellate Procedure contemplate that ordinarily such applications for stay pending appeal shall be considered by a full three-judge panel of the court unless it appears that such procedure would be impractical "due to the requirements of time", Rule 8(a) Fed. R. App. P. The exercise, therefore, of the powers of stay under Rule 8 by a single judge is subject to many of the same considerations of immediacy that affect the issuance of temporary restraining orders generally. In other words, the very immediacy of the problem which gives rise to the power itself precludes that fuller opportunity for exploration of the facts and circumstances which may ultimately be necessary to determine a stay of long duration.

The application on behalf of the Association was presented to the undersigned at approximately 4:00 p.m. on Wednesday, September 19, 1979. Within the confines of the limited time available, the court heard oral argument from Mr. Theodore W. Swift on behalf of the Association, from Mr. James S. Brady, United States Attorney, on behalf of the United States and informally at least, from Mr. David C. Meyers, on behalf of the judges of the 13th Judicial Circuit. Attached to the application for stay were affidavits by Mr. Myrl Keller and Mr. James Scott supporting the Association's claim that the threat of depletion of the lake trout fisheries in zone MM-4 was immediate and irreparable. Subsequently, on the following morning, the United States Attorney thoughtfully pro-

vided the undersigned with copies of exhibits which had been received before the district court and which will, therefore, be a part of the ultimate record on appeal.

I must in all candor acknowledge that the likelihood that the Association can prevail upon appeal is far from certain. The ultimate resolution of the overall dispute embodied in the appeal in the principal litigation promises to be both difficult and complex. At the same time the uncontroverted evidence placed before me strongly indicates that unless an immediate halt of gill net fishing in area MM-4 occurs, that area will be fully depleted of fish before any final resolution can be made of the principal litigation from which the stay of the state court action issued or, indeed, before the parties in the principal litigation are even able to agree upon adequate and equitable regulations to avoid it. This conclusion was at least tentatively reached by the state court for the 13th Judicial Circuit of Michigan in its specific findings incorporated in its temporary restraining order.

The district judge here has pointed to the irreparable harm which the injunction of gill netting activities will cause to the defendant Indians. However, the assertion that these gill netting activities would seriously and perhaps irreparably diminish the very supply of fish which the district court says is necessary for the Indians' guaranteed enjoyment of treaty rights stands uncontradicted. The conclusion that if the fishery is destroyed, it is destroyed for all, including the Indians themselves, is inescapable.

The affidavits submitted to me concerning this issue are made particularly impressive by the obvious knowledge and expertise of the affiants themselves.[3] Affiant Myrl Keller

---

[3] Those affidavits are appended hereto as Attachments "A" and "B".

is Great Lakes Fisheries Supervisor for the Michigan Department of Natural Resources and has served in that position since 1967. As his affidavit makes clear, he possesses an intimate and long-standing acquaintance with the development of the successful restocking programs undertaken by that department in the waters of Lake Michigan, particularly those concerning lake trout.

In his affidavit Mr. Keller asserts that, based on 94 documented physical inspections made between July 16 and July 31, 1979, he believes that non-licensed fishermen using gill nets for fishing have removed 4587 lake trout, weighing a total of 32,109 pounds, from outer Grand Traverse Bay, an area included within zone MM-4. Keller further states that by use of highly mechanized equipment the gill net fishermen have vastly increased their catch since that time, and that from August 1 through August 15, there was an additional catch of 2,226 lake trout weighing approximately 15,584 pounds.

After further citing facts known to him or observed by him, Mr. Keller opines that "efforts of the State of Michigan and other agencies, to establish a viable Lake Trout fishery in Grand Traverse Bay have been immediately and irreparably damaged by this onslaught of gill net activity, and that total waste and destruction of a viable fishery, and a valuable resource, if it has not already occurred, will soon occur."

Of like import is the affidavit of John A. Scott, Chief of the Fisheries Division of the Department of Natural Resources. Mr. Scott's affidavit outlines the immense success of the state's effort to restock the waters of Lake Michigan after their earlier and serious depletion, and reaches a similar conclusion, estimating that the gill net activity of the defendants will

"totally destroy the lake trout population in outer Grand Traverse Bay within six weeks." That affidavit was made August 22, 1979.

While I have been furnished with certain exhibits introduced before the district court in the form of studies by the Department of the Interior, I am unable to ascertain in them any evidence which controverts the hard facts contained in the affidavits of Messrs. Keller and Scott, except perhaps the conclusion that the entire fish population will be totally depleted in any given length of time. The studies made by the United States Department of the Interior Fish and Wildlife Service and submitted to me by the United States in opposition to this motion indicate that no lake trout should be removed from the Grand Traverse Bay *at all* if the fish in those waters are to be dedicated entirely to the re-establishment of naturally self-sustaining fish resources. Measuring the uncontroverted estimates of the take from Grand Traverse Bay, it would appear that even if the population were to be maintained entirely by artificial stocking of those waters, the permissible amounts of take from those waters has already been exceeded.

I view my role at this time as one of balancing the several immediate interests represented to me as existing in this case, recognizing at the same time the inability of a single judge in a very short time to reach any reliable or final conclusion. The following passage from *Metropolitan Detroit Plumbing and Mechanical Contractors Association v. HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976), quoted with approval by our court in *Roth v. Bank of the Commonwealth*, 583 F. 2d 527, 537-38 (6th Cir. 1978), explains this role:

> In addition to assessing the likelihood of success on the merits, the court must consider the irreparability of any harm to the plaintiff, the balance of injury as between the parties, and the impact of the ruling on the

> public interest. In general, the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction. . . . It thus appears that the precise wording of the standard for the likelihood of success on the merits is not as important as a realistic appraisal of all the traditional factors weighed by a court of equity. A balancing is required, and not the mechanical application of a certain form of words.

Under all of the circumstances, I conclude that the limited discretion vested in me by Rule 8 is best exercised at this time by entering a limited stay of the injunction issued by the district court. The regular October term of the Sixth Circuit commences Monday, October 1, 1979. Thereafter a regular panel of the court should be available to provide the more considered judgment which I believe is necessary to determine whether the temporary stay which I shall grant is to be continued pending final outcome of the appeal. Accordingly, an order will enter staying the judgment of the district court from which appeal is taken for a period of thirty days from the date hereof, unless otherwise ordered by a regular panel of the court to whom this application is to be referred for further consideration.

Albert J. Engel /s/

Albert J. Engel
Circuit Judge

AFFIDAVIT OF MYRL KELLER

STATE OF MICHIGAN }
COUNTY OF OTSEGO } SS.

Myrl Keller, being duly sworn, deposes and says that:

1. The information set forth in this Affidavit is the result of his personal knowledge and if called as a witness he can competently testify as to the matters set forth below.

2. He is the Great Lakes Fisheries Supervisor for the Michigan Department of Natural Resources and has served in this position since 1967. He is assigned to duty at the Great Lakes Fish Station, Charlevoix, Michigan.

3. His department is charged with the responsibility of evaluating and monitoring all of the Michigan fisheries in Lake Michigan and for making management recommendations for all of the Michigan waters of Lake Michigan (designated as MM) from New Buffalo, Michigan, to Menominee, Michigan; his responsibilities include working with the U.S. Government, Michigan State University, the University of Michigan, the Great Lakes Fisheries Commission, and the other Great Lakes States in research designed to lead to the effective control and management of the various fisheries of the Great Lakes, and, in particular, Lake Michigan.

4. With the planting efforts commenced by the Department of Natural Resources, and the advent of effective control of the sea lamprey, the Lake Michigan fishery in general, and the fishery in Zone MM-4 (all that portion of Grand Traverse Bay lying south of a line drawn from the Grand Traverse Light Station on the northern point of the Leelanau Peninsula due east to a point near Norwood, Michigan) prospered and flourished; under severe controls imposed by the Department,

the fishery rapidly expanded to a point where fishing grew to a major resource and industry in Lake Michigan, in general, and in Zone MM-4, in particular.

5. His agency, since 1965, has been heavily engaged in attempting to create a fishery, and a conducive accompanying environment, which would cultivate and sustain the natural reproduction of Lake Trout in Lake Michigan and in Zone MM-4. Extensive research has been devoted to this effort, and the first signs of successful natural reproduction had recently been recognized in Zone MM-4.

6. Since July 15, 1979, when certain non-licensed individuals using gill nets commenced intensive fishing efforts south of a line running from Good Hart, Michigan, to the northern tip of North Manitou Island including repeated forays into Zone MM-4, he, and his staff of fourteen (14), have been heavily engaged in attempting to monitor and inspect the catch made by said gill net fishermen operating in Grand Traverse Bay (MM-4).

7. From projections made based on ninety-four (94) physical and documented visual inspections made during the period of July 16 through July 31, 1979, he believes that those non-licensed fishermen using gill nets have removed, during said period, 4587 Lake Trout (averaging seven (7) pounds per fish) or a total of 32,109 pounds of Lake Trout from Outer Grand Traverse Bay (that portion of Zone MM-4 lying north of the tip of Old Mission Point).

8. Since July 31, 1979, the fishing pressure by said gill net fishermen has increased and intensified with the arrival of various tugboats carrying highly mechanized equipment, resulting in a catch that he believes has vastly increased over the period of July 16 through July 31, 1979. Physical inspections for the period from August 1 through August 15, 1979, reveal,

however, a gill net catch of 15,584 pounds of Lake Trout, or some 2,226 additional Lake Trout (average weight, seven (7) pounds; average length, twenty-six (26) inches; age at entry to fishery, six (6) years). The operations of many of these gill net fishermen occur at night, by "in-and-out" type fishing, which makes monitoring difficult. These fishermen sometimes sell their catch at points of landing or ship the fish directly out-of-state before a record or observation of the catch can be made. Further, Department personnel attempting to monitor the fisheries are often met with obscenities and antagonism, making monitoring especially difficult. Consequently, he concludes that the Department's estimates of the catch by these gill net fishermen are extremely conservative. He believes, as a conservative figure, that 6,813 Lake Trout, totalling 47,691 pounds, have been removed by said gill netters from Zone MM-4 as of August 15, 1979.

9. Since only Lake Trout who have achieved an age of six (6) years, weight of seven (7) pounds, and a length of twenty-six (26) inches, can normally be assumed to be capable of spawning, he believes that more than 25% of all spawning stock in Zone MM-4 have been destroyed by the gill netters as of August 15, 1979.

10. He believes that irreparable harm to the expensive and carefully conceived spawning program in Grand Traverse Bay has already been inflicted by the gill netters, and further believes that all potential spawner Lake Trout in Zone MM-4 will be substantially depleted, unless said practices are halted, within the next sixty (60) days. He believes that the redevelopment of any successful Lake Trout reproduction program in Zone MM-4, if the depletion of spawning stock is allowed to continue, will take years to foster.

11. He believes that his efforts, and the efforts of the State of Michigan and other agencies, to establish a viable Lake

Trout fishery in Grand Traverse Bay have been immediately and irreparably damaged by this onslaught of gill net activity, and that total waste and destruction of a viable fishery, and a valuable natural resource, if it has not already occurred, will soon occur.

Myrl Keller /s/

Myrl Keller

Myrl Keller, being first duly sworn, deposes and says that he had read the foregoing Affidavit and is familiar with the statements contained therein; and that the statements contained therein are true, except as to those stated to be upon information and belief, and that those he believes to be true.

Myrl Keller /s/

Myrl Keller

Subscribed and sworn to before me
this 25th day of August, 1979
Ursula A. Pruss /s/
Notary Public
Otsego County, Michigan

My Commission Expires: 1981, April

AFFIDAVIT OF JOHN A. SCOTT

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

John A. Scott, being duly sworn, deposes and says that:

1. The information set forth in this Affidavit is the result of my personal knowledge and, if called as a witness, I can competently testify as to the matters set forth below.

2. I am employed by the Michigan Department of Natural Resources, as its Chief, Fisheries Division, in Lansing, Michigan.

3. A combination of seal lamprey predation and intensive commercial fishing during the 1940's and 1950's resulted in the virtual extinction of the lake trout and white fish populations in the upper Great Lakes. During the preceding period in which lake trout had been abundant, they had supported valuable commercial and recreational fisheries, and as a fish predator had exerted restraint and balance on nonpredatory species. Without this restraint smelt and alewives proliferated in the waters of the Great Lakes, mainly at the expense of important native species, such as chubs, herring, and yellow perch. As the population of alewives reached its maximum abundance in the mid-1960's, massive die-offs of this species littered the beaches of the Great Lakes, causing great economic losses to the tourist and resort industries of Michigan.

4. In 1966, the State of Michigan made a major policy decision to initiate a program to rehabilitate the fisheries resources of its Great Lakes. The State supplemented the sea lamprey control and lake trout rehabilitation programs underway by the United States and Canadian Governments, and introduced coho and chinook salmon from the Pacific. The State enacted legislation that provided authority to limit the number of commercial fishermen, to apply controls over the harvest of fish from the Great Lakes, to limit areas and depths that could be fished, to designate species which could be caught, and to limit the use of the destructive and wasteful gill net.

5. The State's hatcheries have produced and planted over 14,000,000 trout and salmon fingerlings in the Great Lakes since 1966. The annual cost of the State's hatchery operations

is approximately $3 million. These operational costs are paid almost entirely from revenue received from sport fishing licenses. Additional funds, in the amount of $11.7 million, have been expended to remodel and rebuild Michigan fish hatcheries.

6. Through intensive management and commercial fishery controls, the Great Lakes have been converted from being almost a biological liability to being an immense economic asset. In 1976, about 2.8 million angler days of effort were spent by sport fishermen on the Great Lakes and tributary streams, fishing for trout and salmon. Trout and salmon sport fishermen alone accounted for an estimated catch of 845,000 lake trout, 500,000 steelhead, 748,000 coho salmon, and 742,000 chinook salmon. The Great Lakes trout and salmon sport fisheries, in terms of goods and services alone, add an estimated $250 million annually to the economy of this State. This multimillion dollar public resource has emerged only after years of intensive management and conservation of these fishery resources.

7. Our success in reestablishing a valuable population of lake trout in Lake Michigan has been accompanied by a number of problems, among which has been the failure of lake trout to reproduce in Lake Michigan. Although reproduction of unknown magnitude did occur in Grand Traverse Bay in 1977, the degree of natural reproduction by planted lake trout in Lake Michigan has, to date, remained unsuitably low to expect that a population of lake trout in Lake Michigan will soon be self-sustaining. Progress is being made in this area, but it will take several more years of careful conservation and management of this resource before a level is reached at which the species is self-propagating in Lake Michigan.

8. A gill net is an extremely "efficient" means of catching fish, in comparison with conventional sport fishing tackle,

in the sense that a gill net will allow its user to catch large quantities of fish within a short period of time and with a minimum investment in gear. Unfortunately, however, gill nets are also dangerously nonselective, and it is nearly impossible for the operator to direct his fishing effort toward a particular species. Nearly everything which meets the gill net becomes entangled therein, and death shortly results. For this reason, it is nearly impossible to return lake trout caught in a gill net to the water. A gill net fishery can quickly deplete an area of available trout and salmon stocks.

9. Recent history provides two examples in which gill net fisheries have seriously depleted lake trout stocks in the Great Lakes. The first is Whitefish Bay in Lake Superior, where the Michigan Department of Natural Resources recently completed an assessment of the lake trout population. The following data show the number of lake trout taken per 1,000 feet of test nets lifted by the MDNR's assessment crews since 1973.

YEAR	*NUMBER TROUT PER 1,000 FEET NET*
1973	32.3
1974	53.3
1975	8.9
1976	4.4
1977	3.6
1978	2.3
1979	1.7

It took about twenty years to build a spawning stock of lake trout in Whitefish Bay, but between 1974 and 1975, unregulated gill net fishing destroyed the fruits of all those efforts.

10. A second historical example may be found in Northern Lake Huron, where lake trout restoration is of more recent

origin. Commercial gill nets were banned in 1970, and the lake trout populations were being rebuilt, but an unregulated gill net fishery again destroyed those efforts in a short span of time. An intensive gill net fishery operated in this area in the fall of 1978 and spring of 1979. The MDNR's biological assessment report of lake trout and associated species in Northern Lake Huron, completed on June 28, 1979, concluded that the 1973-74 stockings of lake trout were much less abundant in 1979 than would be expected from test catches made in 1976-78. The survival rate for the population of trout stocked in 1973 was only 1 to 2%. The population of trout stocked in 1974, which should have been most abundant in 1979, was reduced to a mere 16% of the population as measured in 1978.

11. Prior to Defendants' gill netting, Grand Traverse Bay in Lake Michigan was the very "heartland" of Michigan's sport fishing industry. As a result of Defendants' gill netting in Grand Traverse Bay, the sad historical pattern established by gill netters in Whitefish Bay and in Northern Lake Huron is well underway in Grand Traverse Bay. During the last two weeks of July, 1979, the Michigan Department of Natural Resources estimated that Defendants caught about 32,000 pounds of lake trout in outer Grand Traverse Bay. Given an average weight of seven pounds, that catch equates to about 4,600 fish or, for another perspective, would amount to a daily catch limit for over 1,530 sport fishermen. Since August 1, 1979, the number of fishing units operated by Defendants in outer Grand Traverse Bay have more than doubled.

12. As Chief of the Fisheries Division, I oversee and supervise the activities of Mr. Myrl Keller, whose accompanying Affidavit I have read. Based upon the reports of Defendants' catches contained in that Affidavit, I conclude that Defendants' activities to date have already Grand Traverse Bay by 25 to 50%. Further, based upon Defendants' existing

fishing intensity, I estimate that Defendants' fisheries will totally destroy the lake trout population in outer Grand Traverse Bay within six weeks.

Further, Affiant sayeth not.

John A. Scott /s/

John A. Scott

Subscribed and sworn to before me this 22nd day of August, 1979.

Barbara A. Watts /s/

Notary Public
Ingham County, Michigan

My commission expires: 3-14-81

No. 79-1527

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, et al., Plaintiffs-Appellees V. STATE OF MICHIGAN, et al., Defendants and GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, Intervenor-Appellant	

FILED OCT 19 1979 JOHN P. HEHMAN, Clerk

ORDER

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

This Court has before it the question of whether a stay granted by Judge Engel in this case should be continued, pending final disposition of the appeal. We conclude that we should continue the stay in effect.

On May 7, 1979, District Judge Noel Fox issued an opinion and a declaratory judgment, *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), in an action brought by the United States and two Indian tribes in Michigan, the Chippewa and the Ottawa tribes (represented by the Bay Mills Indian

Community and the Sault Ste. Marie Tribe of Chippewa Indians) against the State of Michigan and certain state officials. That case is now pending on appeal in this Court as case No. 79-1414. The District Court held that under treaties entered into between the United States and the Chippewa and Ottawa tribes in 1836 and 1855, 7 Stat. 491 (1836), 11 Stat. 621 (1856), these tribes have unique, exclusive, off-reservation rights to engage in gill net fishing in waters of Lake Michigan, despite Michigan laws to the contrary. The District Court apparently held that these treaties grant the Indians an absolute right to engage in gill net fishing in these waters free from any regulation whatsoever by the State of Michigan or any limitations of time, place or manner generally applicable to other citizens, even if such gill net fishing completely destroys fisheries, fish supplies and spawning grounds in Lake Michigan.

This decision conflicts with *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) in which the Supreme Court of Michigan in an opinion by Justice Mennen Williams—although acknowledging the continued existence of unique, off-reservation, Indian fishing rights under the treaties—held that the State may regulate gill net fishing if necessary to preserve fish from extinction or prevent irreparable damage to fish supplies or destruction of fisheries.

Having found in case No. 79-1414 that the state has no power to limit Indian fishing rights in any way, District Judge Fox in this case, No. 79-1527, enjoined certain Michigan state judges (1) from proceeding any further in a state action to determine the right of Indians to engage in gill net fishing in Grand Traverse Bay and (2) from issuing a temporary restraining order against such fishing pending disposition of the state action. On September 26, 1979, Judge Albert Engel of this Court stayed Judge Fox's order against

the state judges until October 25, 1979, pending consideration of the stay by a full panel of this Court under Rule 8 of the Federal Rules of Appellate Procedure.

For the reasons stated by Judge Engel in his order of September 26, 1979, we continue in effect the stay of District Judge Fox's order pending disposition of the appeal in this case and case No. 79-1414. We find on the basis of the record now before us that unless the order is stayed there is a strong possibility that the fishery, the fish supply and spawning grounds in Grand Traverse Bay will be irreparably damaged or destroyed by continued intensive gill net fishing. We further conclude, tentatively, in assessing the likelihood of appellant's success on the merits, see *Reed v. Rhodes*, 549 F.2d 1046 (6th Cir. 1976), that the reasoning of the Supreme Court of Michigan in *People v. LeBlanc, supra*, appears to be more persuasive than the reasoning of Judge Fox's opinion of May 7, 1979. We base this conclusion also on the Supreme Court opinions discussed and applied in the opinion of the Supreme Court of Michigan and Judge Engel's opinion.

Accordingly, it is so ORDERED.

ENTERED BY ORDER OF
THE COURT

John P. Hehman

[John P. Hehman]
Clerk

Nos. 79-1635, 79-1414, 79-1527

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED NOV 28 1979 JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA AND BAY MILLS INDIAN COMMUNITY,
Plaintiffs-Appellees

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS,
Intervenors-Appellees,

v.

STATE OF MICHIGAN AND MICHIGAN NATURAL RESOURCES COMMISSION AND ITS AGENTS, HOWARD A. TANNER, HENRY VONDETT AND GEORGE DAHL, IN THEIR OFFICIAL CAPACITIES, (79-1635)
Defendants-Appellants

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

BAY MILLS INDIAN COMMUNITY; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION AND ITS AGENTS, DR. HOWARD A. TANNER, DR. HENRY VONDETT AND GEORGE DAHL IN THEIR OFFICIAL CAPACITIES, (79-1414)
Defendants-Appellants

UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellees

v.

STATE OF MICHIGAN, et al.,
Defendants

and

GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, (79-1527)
Intervenor-Appellant

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

ORDER

On October 19, 1979, a three judge panel of this Court entered an order staying a previous order of District Judge Fox in this case involving Indian fishing rights in the Great Lakes. A copy of that order is attached. On October 26, 1979, Judge Fox issued a temporary order restraining the State of Michigan from enforcing against the Grand Traverse Band of Ottawa and Chippewa Indians state laws against gill net fishing in the Great Lakes. This order appears to apply to all areas of the Great Lakes other than Grand Traverse Bay, the only area specifically covered by our order of October 19, 1979. Judge Fox's temporary restraining order of October 26, 1979, was issued pending a hearing on a motion for preliminary injunction set for a later date.

Judge Fox's order of October 26, 1979, is hereby stayed pending disposition of the appeals in Nos. 79-1414 and 79-1527 for the reasons stated in our order of October 19, 1979, and for the further reason that, based on the record now before

us, it appears that the same considerations apply in other areas of the Great Lakes as apply in Grand Traverse Bay, which was the subject of our stay of October 19, 1979. On the basis of the record now before us, there is a strong possibility that fisheries, fish supplies and spawning grounds in other areas of the Great Lakes will be irreparably damaged or destroyed by continued intensive gill net fishing.

Accordingly, the order of the District Judge dated October 26, 1979, temporarily restraining the State of Michigan from enforcing laws against gill net fishing in the Great Lakes is hereby stayed pending disposition of the appeal in Nos. 79-1414 and 79-1527.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN /s/

John P. Hehman, Clerk

[505 F Supp 467]

UNITED STATES of America et al., Plaintiffs,

v.

STATE OF MICHIGAN et al., Defendants.

No. M26-73 C.A.

United States District Court, W. D. Michigan, N.D.

May 9, 1980.

• • •

[505 F Supp 470]

OPINION

FOX, Senior District Judge.

On October 12, 1979, the State of Michigan filed a motion before this court for a partial stay of judgment pending the outcome of its appeal to the United States Court of Appeals for the Sixth Circuit. The motion was addressed to that portion of this court's May 7, 1979 declaration D.C., 471 F.Supp 192, which held that the State lacked authority to regulate fishing by treaty tribe members in waters of the Great Lakes ceded under the Treaty of March 28, 1836 (7 Stat. 491). Included in the State's application was a proposal which indicated the concept of Indian regulation which it would impose if its stay were granted by this court.

The State argues in its motion that subsequent to this court's May 7, 1979 opinion, Indian fishing had increased tremendously causing irreparable harm to ". . . Lake Trout, Whitefish and other targeted species in the Michigan Waters of the Great Lakes."

The State also contends that "unlimited use of gill nets will ultimately lead to the collapse of the fisheries resource," that the conservation codes of the tribes' and the Secretary's regulations ". . . are nothing more than licenses allowing unlimited slaughter of Lake Trout, Whitefish, Coho Salmon, and other species," and that the Indian fishery is irreparably harming the recreational fishery.

The relief prayed for by the State is to allow it to regulate treaty fishers, pending the outcome of the appeal, consistent with an "Indian Fisheries Assistance and Development Proposal" set forth as an attachment to its brief.

The State has not based its motion on a challenge to this court's holding that the Michigan Indians retain the aboriginal right to fish in the ceded waters of the Great Lakes. This right is fully protected by the Constitution of the United States as the Supreme Law of the land. In evaluating the State's motion, this court is again obliged to implement the Constitution, on penalty of violating its oath:

> No one can deny that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature, or of congress, which is repugnant to it, can be of any validity. Now, if an act of a state legislature be repugnant to the constitution of the state, the state court will declare it void; and if such act be repugnant to the constitution of the Union, or a law made under that constitution, which is declared to be the supreme law of the land, is it not equally void? And under such circumstances, *if this court should shrink from a discharge of their duty, in giving effect to the supreme law of the land, would they not violate their oath, prove traitors to the constitution and forfeit all just claim to public confidence?* *Worcester* v. *Georgia*, 31 U.S. (6

Pet.) 515, 571-2, 8 L.Ed. 483 (1832) (McLean, J., concurring). (Emphasis supplied.)

STANDARDS FOR A STAY PENDING APPEAL

To obtain a stay of a district court injunction pending an appeal, certain familiar tests must be met. The standard is set forth in *Virginia Petroleum Jobbers Ass'n.* v. *F.P.C.*, 259 F.2d 921 (D.C.Cir. 1968), and may be paraphrased as follows:

(1) Has the petitioner made a strong showing that it is likely to prevail in the merits of the appeal?

(2) Has the petitioner shown that without such relief, it will be irreparably injured?

(3) Would the issuance of a stay substantially harm other parties interested in the proceedings?

(4) Where lies the public interest?

Before addressing these matters, a general word about the typical situation in which

[505 F Supp 471]

a stay is granted is in order. The classic situation wherein a stay is granted pending appeal is when the moving party below has been successful and the requested relief will require the implementation of plans and expenditure of funds which cause major dislocation and change to the defendants.[1] For example, in the *Reserve* mining case (*Reserve*

[1]

Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit.

Washington Metropolitan Area Transit Commission v. *Holiday Tours, Inc.*, 559 F.2d 481, 844 (D.C.Cir.1977).

Mining Co. v. *United States,* 498 F.2d 1073 (8th Cir. 1974)), the plaintiff obtained an order requiring a major employer to cease polluting the air and water at the west end of Lake Superior. Because the district court's order could have resulted in a shut-down of Reserve's taconite mining operations, the resultant loss of hundreds of jobs by that area's largest employer, it was appropriate to stay that order and maintain the status quo pending appeal.

Similarly, the Court of Appeals for the Sixth Circuit has stayed the effect of a district court injunction requiring the integration of a large city school system for the same kind of reasons. Such an order forcing integration causes staggering dislocations in a school system and requires the expenditure of massive sums of money for busing and the like, and pending an appeal on the merits, the Appeals Court has, from time to time, issued stay orders. *Northcross* v. *Board of Education of Memphis City Schools,* 463 F.2d 329 (6th Cir. 1972). But *compare Northcross, supra,* with *Reed* v. *Rhodes,* 549 F. 1050 (6th Cir. 1976), where the entry of a stay by a single judge was vacated by a three-judge panel, in a school desegregation case.

Here, unlike the typical situation in which a stay might be appropriate, the State urges this court change radically the status quo of *no* State regulation to that of State regulation. In March 1977, the State filed a motion before this court to compel the United States to issue identification cards to treaty-right fishermen under 25 C.F.R. Part 256. The State argued that there were many fishermen claiming to be Indian who in fact were not and, therefore, should be fishing subject to State rules and regulations. The United States responded in a brief which took the position that it could not be compelled legally to issue those identification cards, but nonetheless was willing to do so to assist the State in dealing with the fisher-

man identity problem. (*See* Transcript of Hearing held April 7, 1977.) Subsequent to that hearing, the United States issued so-called "256 cards" to treaty-right fishermen which were signed by the particular tribal chairman and a representative of the Bureau of Indian Affairs. Thereafter, the State voluntarily agreed not to impose its fishing rules and regulations on any card-carrying tribal member. [2]

As recently as October 25, 1979, counsel for the State of Michigan stated to this court:

> [By Mr. Gregory T. Taylor] And, the United States has endorsed and the State of Michigan has accepted during the pendency of this case the 256 card method, and that is the method that was also employed by Congress.
>
> • • • • • •
>
> . . . and I represent to the Court on the record if and when the members of this organization [referring to the Grand Traverse Band of Ottawa and Chippewa Indians] are recognized and receive 256 cards they will not be arrested. Until that time, they are subject to arrest under state law.

Transcript of Hearing on Motion for Temporary Restraining Order, *United States* v. *Michigan*, Civ. No. M 26-73, pp. 20 and 24, October 25, 1979.

---

[2]

In the State's Motion to Compel the United States of America to Issue Indian Identification Cards, dated March 21, 1977, paragraph 8 provides:

> If the Court does issue such Order, the State Defendants will not arrest, or attempt to enforce its fishing laws and regulations, against any Indian validly holding such identification card, during the pendency of this action.

[505 F Supp 472]

It is clear then that at least since the Spring of 1977, the status quo has been *no* state regulation of treaty-right fishermen who are properly identified and who fish in compliance with applicable tribal fishing regulations. By seeking a partial stay before this court, the State is asking that the status quo be turned one hundred eighty degrees to allow them to regulate treaty fishers pending the outcome of the appeal, something they have not done for over three years. The purpose of a stay is to preserve, not change, the status quo pending the outcome of an appeal.

LIKELIHOOD OF SUCCESS ON APPEAL

The State indicated its likelihood of success on appeal is predicated upon the "*Puyallup* line of cases and *Washington* v. *Fishing Vessel Ass'n* [443 U.S. 658, 99 S.Ct. 3055], 61 L.Ed. 2d 823 (1979)."

This court considered the *Puyallup* line of cases in its Judgment of May 7, 1979 and will not reanalyze it here. Suffice it to say that this court declared that the restricted state regulation of Indiana treaty fishers permitted in that line of cases can only be understood in terms of the language of the underlying treaties limiting the Indians' reserved right to fish to a right "in common with all citizens of the territory," a limitation explicitly imposed after negotiations. Justce Douglas focused upon this language in initially declaring Washington's right to regulate its Indians:

> Moreover, the right to fish at those respective [usual and accustomed] places is not an exclusive one. Rather it is one "in common with all citizens of the territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not

> also be regulated by an appropriate exercise of the police power of the State. *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 at 398, 88 S.Ct. 1725 at 1728, 20 L.Ed.2d 689.

Where the Indians' right to fish is held in common with all other citizens of the territory by virtue of specific treaty language, Justice Douglas saw that there is no reason to prevent the State from regulating the Indians in common with its other citizens, even if only by distinct appropriate regulations. In contrast, the Indians of Michigan presently hold an unabridged, aboriginal, tribal right to fish derived from thousands of years of occupancy and use of the fishery of the waters of Michigan. That aboriginal right arose from the tribes' reliance upon the fishery for its livelihood, that is, from its dependence upon this fishery for food and trade. This right was confirmed in its entirety by the Treaty of Ghent and left whole by the Treaties of 1836 (7 Stat. 459) and 1855 (11 Stat. 621). Thus, today the Michigan tribes retain the right to fish Michigan treaty waters to the full extent necessary to meet the tribal members' needs.

As noted in *United States* v. *Washington,* 384 F.Supp. 312, 342 (E.D. Wash.1974), *"any regulation will restrict the exercise of a right guaranteed by the United States Constitution."* In Michigan, this court found, the negotiators for the United States did not raise the issue of Indian fishing rights, preferring instead to leave the Indians with the impression that those rights would not be qualified after the treaty. The United States displayed indifference about getting the Indians' fishing right; indeed, appeared willing to leave the right with the Indians rather than raise a former point of contention with them. When the court in *People* v. *LeBlanc,* 399 Mich. 31, 248 N.W.2d 199 (1976), authorized restricted state regulation similar to that authorized in Washington, it did so only after declaring that the right of the Michigan Indians

is "in fact" a right held "in common with" non-treaty citizens. The holding of *People* v. *LeBlanc* ignores the negotiations of the Michigan treaty and its terms, a not surprising outcome since that court did not have the benefit of the factual record developed in this court. Since the Indians' right to fish is not limited by the Michigan treaty, the Indians do not hold the right "in common with all other citizens of the territory" and the State may not restrict the exercise of a right guaranteed by

[505 F Supp 473]

the United States Constitution by regulating the exercise of that right. To permit the State to do so would usurp a prerogative of the United States and undermine, in the case of those tribes which are exercising adequate self regulation, the Congressional policy of fostering Indian sovereignty.

This court has not yet evaluated what impact *Washington* v. *Fishing Vessel Ass'n, supra,* might have on this case. The basis for the State's claim that it enhances the likelihood of success on appeal is its holding that the fishing right of Indians, where the right is held in common with the citizens of the territory, is limited to so much of the fish as is necessary to provide the Indians with a moderate livelihood.

Fishing Vessel Ass'n is an allocation, not a regulation case. However, its principles support the position that the State's authority to regulate treaty right fishing is not the same in Michigan as it is in Washington.

Fishing Vessel Ass'n relies upon *Arizona* v. *California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), and *Winters* v. *United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1903). Both involved implicit reservations of previously held aboriginal water rights. *Fishing Vessel Ass'n* modifies these cases to the extent that it measures the Indian fishing right

in terms of changing needs and numbers of Indians. The Supreme Court illustrated this principle by considering the right of the Indians as decreasing over time, as fewer Indians participate in the aboriginal fishery and achieve their moderate standard of living from a lesser percentage of the total available catch. The Court could not display this principle except on the hypothesis of a declining fishery, because Indians in Washington presently have only a right to an opportunity to catch 45-50% of the available catch, and it can never go higher. This 50% maximum arises directly from the "in common with" language in the Washington treaties. 443 U.S. 686, 99 S.Ct. 3075, 61 L.Ed.2d 846. The 50% ceiling is suggested, if not necessarily dictated by, the word "common" as it appears in the Washington treaties. No such language is present in the Michigan treaties. 443 U.S. at 686 n.27, 99 S.Ct. at 3075 n.27, 61 L.Ed.2d at 846 n.27.

The general principle in *Fishing Vessel* is that Indian treaty rights to scarce natural resources are defined by what is necessary to assure that the Indians' reasonable livelihood expectations are met. 443 U.S. at 686, 99 S.Ct. at 3075, 61 L.Ed.2d at 846. Where, as here, there was no negotiation resulting in a right held in common and the Indians implicitly reserved their aboriginal right in its entirety, this principle might, over time, mandate that the Indians have access to the entire available resource. While the reasoning in *Fishing Vessel Ass'n* indicates that other citizens of the state might have access to resources left over after the Indian needs are satisfied, this is not because the right of the Indians is held "in common with" them, but because the characteristics of the aboriginal, use right.

The non-treaty access of the State to the resources does not appear to give the *State* sufficient interest to render the *state* police power adequate to prevent the lake trout from following the fate of the passenger pigeon. *Puyallup II*, 414 U.S.

44 at 49, 94 S.Ct. 330 at 333, 38 L.Ed.2d 254. Any limitation of the right to the needs of the Indians or limitation of the catch to what is available for harvest must be effected by the federal government or the tribes themselves. The co-tenancy analogy relied upon by the Ninth Circuit to rationalize the fishery allocation and to describe the enforceable rights of treaty and non-treaty fishermen, *United States* v. *Washington*, 520 F.2d 676 (9th Cir. 1975), no longer works here, because the State can find no basis on which to assert a right of its own. There is no common asset for Solomon to divide, because only one party, the Indians, has an enforceable right. In *Washington*, where the right of the Indians is limited by the "in common with all other citizens of the territory" language, the citizens of the State can be said to have a "privilege" to fish. This reflects their quasi co-tenancy. The "privilege" of Michigan citizens is wholly residual, and arises only beyond the demands of the Indians' unabridged aboriginal rights.

[505 F Supp 474]

IRREPARABLE HARM TO THE RESOURCE

A. Introduction.

If the State is to prevail in this motion, it must meet the burden of showing that unless this court's Judgment of May 7, 1979 is stayed, it, or the resource, will suffer irreparable harm.

Not every loss of fish can be deemed irreparable harm. Legally cognizable harm must be identified in terms of applicable legal standards. Those standards are expressed in a series of Supreme Court decisions which deal with state regulation of treaty fishermen.

B. Standards governing irreparable harm.

In *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968), the Court stated that regulation of treaty right fishing is permissible, in the interest of conservation, if the regulation meets appropriate standards and does not discriminate against the Indians.

The Supreme Court of Washington subsequently thought that this holding permitted the State to prohibit Indian gill net fishing and to limit the steelhead catch to a hook and line fishery, belonging to sports fishermen. Indians could fish by hook and line, like all other citizens. In review of the State Court, the United States Supreme Court clarified the meaning of discriminatory regulation. The Court ruled:

> There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians is allowed. *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44, at 48, 94 S.Ct. 330, at 333, 38 L.Ed.2d 254.

It is not enough that the Indians be given an opportunity to fish like all other citizens. They must be permitted to take their portion of the catch by their traditional means.

The Court also stated in *Puyallup II* that a state may not simply carry out its preferred management plan where this interferes with federally protected aboriginal rights. 414 U.S. at 48, 94 S.Ct. at 333. The Ninth Circuit subsequently applied this principle in denying the State the right to enforce its conservation program against Indian fishermen:

> The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. It

> may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. 520 F.2d at 686.

In *Puyallup II* the Court also outlines the standards of conservation governing non-discriminatory regulations: the treaty fishing right is not unlimited. "The treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." 414 U.S. at 49, 94 S.Ct. at 334. The rights may be controlled by the need to conserve a species. If necessary to assure a species of survival, Indian, along with non-Indian fishing, may be banned. 414 U.S. at 49, 94 S.Ct. at 333. Such biological imperatives are expressed in the most dire terms—the survival of a species, not the preservation of a species for non-Indian fishermen or for the economic benefit of the State.

The "appropriate standards" required of non-discriminatory regulations must meet two criteria: (1) the regulation must be a reasonable and necessary conservation measure, and (2) its application to the Indians must be necessary in the interest of conservation. *Antoine* v. *Washington*, 420 U.S. 194, 207, 95 S.Ct. 944, 951, 43 L.Ed.2d 129.

The meaning of the first of these criteria is set out in *United States* v. *Washington*, 384 F.Supp. at 342. "Reasonable" means that a specifically identified conservation measure is appropriate to its purpose; and "necessary" means that such purpose, in addition to being reasonable, must be essential to conservation.

Even more significant is the second of the above criteria; it must be *necessary* to regulate the Indians. *United States* v. *Washington, supra,* says of this standard:

> If alternative means and methods of regulation and necessary conservation are available, the state cannot lawfully restrict the exercise of off-reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

384 F.Supp. at 342. The Ninth Circuit commented in the following language:

> Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine* v. *Washington,* 420 U.S. 194, 95 S.Ct. 944, 952, 43 L.Ed.2d 129 (1975).

520 F.2d at 686. To regulate Indian fishermen first, to apply the same regulations to them as to non-treaty fishermen, is to render the treaty rights nugatory. *United States* v. *Winans,* 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *United States* v. *Washington,* 520 F.2d at 686.

Allocation is a procedure which, in effect, nullifies the above limitations on treaty right regulation by requiring treaty Indians to contribute to the preservation of the run in the first instance. *See, United States* v. *Washington,* 520 F.2d at 686 n. 3. When courts are engaged in allocation of fish in Washington rivers (where there is a self-sustaining popula-

tion which is augmented by planted fish), the norm used to identify fish available for harvest is the numbers of fish necessary to assure maximum escapement. A standard which refers to escapement is not useful in the Great Lakes where non-andronomous fish are under consideration.

Cases decided by the lower courts since the above standards were worked out are not helpful to the effort to give them greater specificity in the context of the Great Lakes. *People* v. *LeBlanc*, 399 Mich. 31, 248 N.W.2d 199, generally adopts the standards set out above and rejects the State's efforts merely to implement its preferred management plan. The court held that the defendant's conviction for fishing with a gill net could be upheld only if:

> (1) The prohibition of the gill net is necessary for the preservation of the fish protected by the regulation;
>
> (2) the application of this prohibition to the Chippewas is necessary for the preservation of the fish protected; and
>
> (3) the regulation does not discriminate against the Chippewas.

399 Mich. at 64, 248 N.W.2d at 215. Recognizing that the "conservation of a species" standard of Puyallup II cannot be understood in terms of "the preservation of a run" for Great Lakes, non-andronomous species, the Michigan Supreme Court attempts to adopt it to the Great Lakes context. "Conservation" becomes "preservation of the fish protected." This can hardly be understood to mean "for the preservation of individual fish caught." The Court does not help in understanding what else is meant, except that it is clear from the context that it is clear from the context that it means to do no more or less than apply the *Puyallup* standard to the Great Lakes.

State v. *Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972), formulated a standard which, when interpreted in terms of fisheries management concepts, strays from the *Puyallup* standard. "Conservation" becomes "prevention of substantial depletion of the fish supply." Such a formulation could be invoked to deprive Indians of their treaty rights long before a threat to the species develops. All that is necessary is that a utilitarian concept of conservation be invoked to preserve the fishery for the greatest number of citizens. Such a concept can be employed to exclude the Indians from a fishery altogether by defining in terms of the needs of sports fishermen, rather than of the protected species.

Besides the *Puyallup* standards protecting species from destruction, and Indians from discriminatory and unnecessary regulation, there is another standard which

[505 F Supp 476]

prevents state regulation where conservation requirements are otherwise satisfied. Congressional policy fosters Indian self-rule. *United States* v. *Michigan*, 471 F.Supp. 192 (W.D. Mich.1979). In view of this, the right of Indians to regulate their own fishermen is protected. *United States* v. *Washington*, 384 F.Supp. 312; *United States* v. *Washington*, 520 F.2d 676. To the same effect is *People* v. *Jondreau*, 384 Mich. 539, 185 N.W. 2d 375 (1971). In that case the treaty in question provided a mechanism for federal regulation of Chippewa fishing rights (direct Presidential intervention), and the State Supreme Court held that this provision for federal regulation prevented direct state regulation of the fishing rights.

C. The State's Presentation of Evidence.

Very little of the State's case here is presented in view of these standards. The State declares that it is necessary for it to ban Indian gill net fishing for conservation purposes. Some of the supporting evidence is couched in terms of alleged destruction of "spawning stock" of lake trout. In certain areas of the Great Lakes, these claims are colorable. However, when it is recognized that "spawning stock" is little more than a name given to lake trout which, subsequent to the State's planting program which ensures widely distributed lake trout populations, have grown to a length of about 25 inches or more and a weight variously described as six or seven pounds, it becomes appropriate to focus upon the stated conservation objectives more carefully. The fact is, almost none of these fish reproduce and preservation of the species in the Great Lakes depends wholly upon the State stocking program.

The Director of the State Department of Natural Resources defined "conservation" in a utilitarian fashion as "management of a resource for the greater good for the greatest number for the longest period of time." Keller and Wright indicated their allegiance to this definition as well. Preservation of a species is not required by this concept, and may even be incompatible with it, as when protection of an endangered species is judged to be too expensive. In fact, this concept of conservation may also be incompatible with other goals of the Department of Natural Resources expressed by its director: a quality environment and biological protection. Yet, it is this concept of conservation which the State invokes to justify its objectives here: exclusion of Indian fishermen from access to the lake trout population, or to any other fish allocated to sportsmen or state licensed commercial fishermen, and denial to them of their traditional methods of fishing. Indian fishermen should presently be excluded from the lake trout harvest

and denied the use of the gill net, the State says, in the interest of conservation and to prevent depletion.

The State declares that good conservation requires allocation of the lake trout to sports fishermen only, a clear discrimination against the Indians. Almost all lake trout presently in the Great Lakes are planted. The return on the investment in hatchery reared trout, if caught by sportsmen, is 17-1, computed in terms of the state and federal cost of the international, federal hatchery program and the total expenditure by sportsmen for goods, services and licenses within the State. Sports fishermen allegedly expend 350 million dollars annually within the State. From the testimony, it appears that some percentage, less than 35% of this total figure, is generated by lake trout fishermen. The precise return from the lake trout sports program is not critical here, however. It is simply necessary to contrast it with the return to the State if the entire planted lake trout population were allocated to the Indian fishermen, whose dockside catch is worth two to four million dollars. The return would then "approach" 1 to 1. By the State's understanding, the greatest good for the greatest number requires allocation to the sports fishermen. It is, however, absolutely clear that this is discrimination against the Indians.

As stated by Director Tanner, the present factor limiting the lake trout catch to sportsmen is economic, not biological, be-

cause the present trout population is derived from hatchery bred fish. This appears to fly in the face of his claim that economic considerations, allocation among user groups, is permissible only after biological demands have been satisfied. Perhaps what this reveals is that the Department of Natural Resources believes that biological necessities for survival of the lake trout are satisfied by the present planting program, if the take is properly limited, as it allegedly is by allocation to sportsmen. However, other testimony indicated that the sports catch is mandated by the fact that public monies are being spent on the rehabilitation program, (principally federal monies, but apparently the public does not make such a distinction). While this latter testimony takes away from the inference that the sports catch is compatible with rehabilitation, it adds weight to the contention that rehabilitation cannot be called a realistic goal at the present time.

Lake trout are central to the State's rationale for banning the gill net. Trout were once a mainstay of the Michigan commercial fishing industry, and the Great Lakes were managed for the commercial fisherman. However, in the middle 1960's the State adopted a major change in management goals, deciding to devote the Great Lakes to the angler. Management choices are now made in favor of the recreational fishery. Accordingly, the Department of Natural Resources banned the gill net to protect the fishery for the angler. The State licensed whitefish fishermen had to adopt gear which would enhance the possibility of releasing lake trout. When a fisherman uses a gill net to catch whitefish, he almost of necessity captures lake trout, since they tend to be in the same waters and the net discriminates only to a limited degree. The trout are then brought to the surface dead and cannot be released. Almost whenever a gill net is used, it will catch lake trout. The State does not want any commercial

fisherman, treaty or non-treaty, to retain lake trout. They have been allocated to sports fishermen.

Under the State's definition of conservation, allocation of trout to sportsmen would be necessary, even if catch limits were biologically defined. Such allocation would still generate greater returns than allocation to Indian fishermen, so long as those returns are measured in terms of total funds generated for the general population of Michigan.

Much of the State's additional testimony was aimed at establishing "depletion" in areas where gill netting occurs. The concept of "depletion" has the ring of a condition where fish stocks have been destroyed or can no longer sustain themselves, a natural condition having been overcome by human activity. In fact, the lake trout population in the Great Lakes was virtually non-existent after 1950. Present populations are almost wholly artificially propagated. The new depletion of which the State speaks is defined in terms of this population and has little reference to whether the stock can sustain itself. Depletion is now defined in terms of a population which is sustained by plantings.

As expressed by Dr. Tanner, the condition of depletion which the State alleges here must be understood against the following background: the State's objective is to attain the maximum *preferred* levels of *harvest* (emphasis supplied). It seeks to maximize the return on the fishery, to continue the stock in a given condition and to enhance it. Given this background, depletion focuses upon the harvest aspects of the above objects. It is defined as "excessive" withdrawal, withdrawal which injures the ability to enhance or maintain the current level of production.

Under this definition depletion arises very quickly where the fish population is allocated to sportsmen. In order to main-

tain the present sports harvest, it is necessary to maintain a high level of abundance. Sports fishing gear, Dr. Tanner reported, is less efficient than commercial fishing gear. An area where there is not a sufficient level of abundance for a sportsman to continue his enterprise might yet contain sufficient fish for the commercial fisherman. The area would not be depleted for the commer-

[505 F Supp 478]

cial fisherman; his harvest would continue. It was necessary for the State to speak of "sports depletion" and "commercial depletion."

Under this definition depletion does not exist—even if the fish are entirely unable to sustain themselves—so long as the levels of harvest can be maintained, even if artificially.

Another indication that the State did not formulate its case in biological terms appears in its condemnation of the gill net. Dr. Tanner commented on the fact that gill nets are widely used on the West Coast and in the Great Lakes off Wisconsin, Minnesota and Ontario, saying that the use of a gill net is consistent with a commercial fishery, but not with a recreational fishery. Such a finding is reported in *United States* v. *Washington*:

> The Director of the Game Department believes that an Indian net fishery for steelhead would be detrimental to the recreational fishery but not necessarily detrimental to the resource itself. 384 F.Supp. at 393

Where there is no sport fishery pressure, Tanner said, arguments in favor of the gill net as a cheap, efficient instrument might prevail. The Canadian waters of Lake Superior are fished with gill nets by commercial fishermen, apparently

without harm to the stocks, because Ontario has chosen to focus upon inland sports fishing and leave the Great Lakes to commercial fishermen. The Director succinctly stated: "The conflict is sports—commercial fishing." This conflict is to be resolved, he said, by the principles of good conservation—the economic concept outlined above. It requires that Indians take only available fish *not sought by sportsmen,* and, in the State's effort to avoid disruption of the present fishery, fish *not presently allocated* to state-licensed commercial fishermen.

As expressed by Dr. Tanner, the gill net is, in final analysis, an inexpensive, efficient method of taking fish, well suited to a fishery made up of individuals with only limited capital on which to base their efforts to make a livelihood. The limited capital requirement supports conservation by permitting a reasonable income on the basis of a smaller withdrawal from the fishery. The State's plan for the commercial fishery appears to engineer in all of the "efficiencies" of the modern corporate farm, the substitution of capital for skill and individual labor.

But, the lucidity of Dr. Tanner's testimony on the merits of the gill net was rare. All of the State's witnesses were employees of the Department of Natural Resources who testified under the scrutiny of their peers. Some of them were instrumental in the adoption of the initial ban on gill netting in the early seventies. All are obviously committed to the implementation of the present policy. Their testimony often had the ring of a public relations effort, seasoned by many presentations to community groups and intended to rally public support in order to influence the legislature. It was clear that the State's witnesses were guided by at-

titudes as much as by evidence.[3] Even when Dr. Scott attempted to speak for the previous witnesses and explained that they were not trying to say that the gill net is simply bad, he could not avoid admitting that in a close case, where either a trawl or a gill net might be used to fish and where many of the vices of a gill net would be duplicated—such as killing the fish—he would still prefer the trawl. At that point his reason appeared to be a desire to protect other recreational activities. The professed reason for not choosing the gill net was the fact that it would be in the water longer.

Attitudes and commitment were obvious in another context as well. Witness Haas presented data showing relative frequencies with which a gill net incidentally catches various inch classes of lake trout. This evidence was presented without regard to the characteristics of the population from which the samples were taken. Haas relied

[505 F Supp 479]

on the resulting tables to support the general conclusion that the gill net is non-selective with respect to size of lake trout, even through each size of net displays characteristic frequencies of catch which witness Berg revealed are statistically significant. Further, when questioned as to the frequency of various sizes of lake trout which might be expected incidental to a whitefish fishery in a hypothetical population (described by the court), Haas was unwilling to make any estimate of the likely percentage of lake trout caught over 21 inches—because he did not know the population. He could not even say whether fish over 21 inches would make up over 50% of the

---

[3]

Given this history and the character of the testimony here, the Indians might well ask whether the State defendant's promise to go to the state legislature to ask for funds to support an Indian changeover to entrapment gear is a hollow promise.

catch. Just before Haas' testimony, witness Keller effectively testified that he believes all lake trout caught in such a population can be considered the equivalent of 21 inches or over, and in his affidavit he considers the entire catch to be 25 inches or over. Haas' evasiveness when faced with the hypothetical question posed by the court appeared to be an effort to avoid taking exception to the position taken in his colleague's testimony and affidavits.

In view of the non-selective character of the gill net, as testified to by Haas and admitted by Keller in a different context, I find Keller's claim that the gill net is so selective in Grand Traverse Bay that you can consider all trout caught there to be 25 inches or over incredible. Even if the average fish caught is 6-7 pounds, the error of attributing to every member of the sample the average characteristics of the same is an elementary statistical error. Accordingly, his testimony that there has been a 50% depletion of "spawning stock" there is also incredible.

The court observed this sort of commitment to policy and position coloring the testimony of nearly every witness. The State's position is that a gill net fishery is inconsistent with rehabilitation of the lake trout. Yet, each witness would declare that some harvest, the present sport harvest, is permissible and not inconsistent with the present rehabilitation effort, even though it sometimes alone exceeds the allowable catch for a self-sustaining fish stock. Each would acknowledge that there are factors affecting the selectivity of the nets, yet despair of regulations according to these factors. Quotas might be imposed to limit the incidental catch, making the gill net fishery impossible after the quota is caught. Yet, this avenue was systematically ignored by the witnesses. Areas might be closed to protect endangered stocks. This too was ignored.

The ambiguity of the State's evidence that lake trout cannot be restored alongside a gill net fishery is also illustrated by the testimony of Asa Wright. Mr. Wright testified that gill net fisheries, first the state licensed commercial fisheries of the 60's and 70's—which continue up to the present time—and then Indian fisheries of the later 70's, are inconsistent with the lake trout rehabilitation program. Part of the evidence for this is that self-sustaining stocks have not developed where gill netting occurred and a trend toward a spawning population was reversed with increased gill net pressure in Whitefish Bay. This draws attention away from the fact that spawning has only occurred in parts of Lake Superior and in one, artificially constructed, area of Grand Traverse Bay, despite years of efforts. Always this evidence is weakened by the fact that early populations were established as a result of massive plantings which the State terminates, or nearly terminates, whenever gill netting occurs, thereby bringing about even greater reduction of the poulation.[4] Also, under the State's present stocking program, the stocks will never again be artificially raised to the levels which existed when the early gill net fishing took place. If the numbers of trout originally released must be maintained before spawning can take place, then nothing the State asks here will provide for it, since the State does not plan to plant at those levels, but plans to plant available numbers

[505 F Supp 480]

of fish throughout the entire Great Lakes. If earlier high levels need not be maintained, then there was no harm to the rehabilitation by the mere removal of the excessive number of fish. The State's present planting program effectively removes far more trout than have the Indian fishermen.

[4]

The total population could be sustained if the federal-state planting program engaged in massive plantings.

Always the evidence is further limited to the outcome of initial planting efforts where the levels of survival are likely to vary unpredictably because of the habitat change since lake trout last occupied an area and because first plantings must carry the entire lamprey load.

Mr. Wright's testimony was permeated with the fundamental ambiguity of the State's case. It never became clear to the court whether he intended to express the opinion that preferred levels of natural reproduction will never take place alongside a gill net fishery, or that no amount of planting can ever result in any natural reproduction so long as gill net fishery exists. From Mr. Keller's testimony it appears that it is the preferred level which is threatened. When asked whether a 50% reduction of the "spawning stock" from Grand Traverse Bay would make natural reproduction impossible, he was hesitant to say it would.

It is clear from the above that the *State simply did not formulate its case in terms of the standard of conservation relevant when Indian rights are to be regulated.* The Supreme Court has outlined a biological concept of conservation and rejected state efforts to maintain its preferred management program. *Puyallup II.* Nevertheless, this court will attempt to evaluate the evidence before it in terms of the appropriate criteria. At the end of this review it will be apparent that in evaluating the State's claim that the Indian gill net fishery is inconsistent with maintenance of the stock of lake trout in the treaty waters, this court is able to parapharase Judge Boldt: The near total absence of substantial evidence to support [this claim] was a considerable surprise to this court. *See, United States* v. *Washington,* 384 F.Supp. at 339.

D. Analysis of Specific Zones:

(i) *Zones MM-1 and MM-2.*

The treaty waters of Michigan are divided into several zones which facilitate statistical analysis. All parties relied upon these divisions to present their case.

The State did not significantly rely upon the character of Indian fishing in zones MM-1 and MM-2 in its effort to establish its case. Zone MM-1 is made up of the Michigan waters of Northeastern Lake Michigan from the Wisconsin Border on Green Bay to a line from Point Detour to the easternmost point of the Northern Michigan-Wisconsin Border. Zone MM-2 covers the Michigan waters of the Northern shore of Lake Michigan from a line from Point Detour to the Northern Michigan-Wisconsin Border to a line drawn south from Port Inland to a line drawn west from Norwood.

The State contended that the lake trout population there has been destroyed by state licensed gill netters fishing pursuant to state court order. This is so much the case that witnesses found nothing extraordinary about the minimal reported incidental lake trout catch, even though almost 900,000 pounds of whitefish were taken from Zone MM-1 by state licensees alone. Indian records reveal a take of 27,817 pounds of whitefish and 26,707 pounds of lake trout from the same zone. (Relying on wholesale reports, the State would place the figures at 70,031 and 950, respectively, for the Indian catch.) The allowable catch of whitefish in Zone MM-1 set by the Ad Hoc Working Group is 960,000 pounds. But, the State can find none that are available for Indian fishermen, and in its proposal allocates them only 50,000 pounds of perch. To permit any Indian to take other

than this would "disrupt" the present, permissible fishery, the State contends.

In its proposal the State allocates 200,000 pounds of whitefish to the Indian fishermen from Zone MM-2 and authorizes a chub fishery which is presently prohibited. The State's answers to interrogatories do not indicate a licensed whitefish take in the

[505 F Supp 481]

area. Indian catch reports reveal a take of 30,899 pounds of lake trout and 42,177 pounds of whitefish from MM-2. (The State's wholesale figures would place the take of lake trout at 107,282 and whitefish at 108,617.)

Evidence presented to the court raised the possibility that the incidental lake trout catch of state licensed fishermen is finding its way to the wholesale market as Indian-caught fish.

(ii) *Zone MM-3.*

Zone MM-3 is bounded on the west by a line drawn from Gulliver Lake on the northern shore of Lake Michigan to the Michigan-Wisconsin line, on the east by the Mackinac Bridge, and on the south by a line from the northeast corner of the Michigan-Wisconsin boundary across the northernmost tip of the Leelanau Peninsula to an intersection with the east shore of the mouth of Grand Traverse Bay. The history of Zone MM-3 was presented to this court largely as evidence of the incompatibility of the gill net with lake trout restoration. It might better be taken as evidence of the need to develop suitable habitat before successful restoration is possible.

The 1965 stocking is reported to have been the principal part of 1.4 million fish—(1 million). In 1968, probably the first year of vulnerability to the gill net, a "large" incidental catch of 49,000 lake trout were caught by state licensed commercial fishermen. By 1971, the 65 planting was extinct. If it is assumed that the "large" incidental catch of 49,000 was taken from the 1965 planting each of the three years before extinction, the 1 million fish were rendered extinct by a catch of 147,000. It becomes worse than implausible to assert that only the gill net could be responsible for the extinction of the plant.

The 1966 planting showed greater stamina, some members surviving until nine years of age. Nevertheless, the State regarded the incidental catch as unacceptable and drastically curtailed plantings in the early 1970's—even after it had banned the gill net in the area and inaugurated a zone management plan.

Zone MM-3 provides no evidence of irreparable harm on the part of the plaintiff tribes, unless in the past year. The gill net fishery of the late 60's and early 70's used to display the horror of the gill net in Zone MM-3 was state licensed. The charge made against Indian fishermen is that the Catch Per Effort (C.P.E.) index used to evaluate the status of the stocks went down 59% from 1977 to 1979, the period of Indian fishing. Interpreted most favorably to the State, this is evidence that the fish stock has gone down. Not to be overlooked is the fact that the stock as a whole was effectively reduced by the economic policy decision not to continue planting at the rate employed in the 60's. This decision effectively removed more fish from the present stock than has Indian fishing. The reduction in rate is likely caused by the dying off of early plantings, the effects of reduced plantings and the failure of the stock to reproduce.

Another point which northern MM-3 illustrates is the futility of the State's effort to provide for a large whitefish catch by gill nets in the midst of its rehabilitation program. Put another way, its zoning was not radical enough to prevent the incidental catches of lake trout which it professes was necessary to its rehabilitation program. If it had been guided by its desire to protect the lake trout so as to build up a self-sustaining stock, it would have prevented gill netting altogether, rather than trying to reap an economic return from the whitefish at the same time. The suggested procedure has been adopted by the tribes on Zone MH-1.

(iii) *Zone MM-4.*

Zone MM-4 is that portion of Grand Traverse Bay lying south of a line drawn from the Grand Traverse Lighthouse on the northern point of the Leelanau Peninsula due east to a point near Norwood, Michigan.

Not only was the impact of Indian gill netting in Zone MM-4 the subject of dis-

[505 F Supp 482]

pute, but even the quantity of fish taken. The testimony and affidavit of witness Keller were the principal sources of these difficulties.

Keller proposed that the total catch from Zone MM-4 can be determined by taking 90% of the estimated total for Zones MM-3 and MM-4. The estimated total is supposedly derived directly from state monitoring reports, augmented only by an estimate of the total number of days each of the fishermen observed during the monitoring actually fished.

The estimated number of days for which each fisherman fished appears on Keller's Attachment A to his affidavit in support of the State's motion as "No of lifts." Overall, the estimates are 2.6 times the number of observed lifts. In other words, 39% of the lifts said to have occurred were monitored (Keller said 50% were). As few as 13% of the alleged lifts of a plaintiff tribe during a two-week period were monitored; as many as 62% during others. The number of lift days remains curiously constant throughout the two-week periods and is generally set at six, except for one two-week period in September, where it is set at 4, supposedly because of inclement weather, and one time in July where units of the Sault tribe allegedly fished for only four days. This curiosity is heightened by the fact that the Indian row boat fishermen are highly mobile and many do not fish full time.

Each of the estimated units allegedly fished within the assigned zone every one of these lift days. Witness Wright avoided dividing his estimate of the total catch for the northern zones of the Lower Peninsula between statistical zones for the very reason which Keller's methodology appears to ignore: the fishermen moved around too much to assign them to one or another zone. The number of feet of net fished by the estimated number of units is assigned to each unit for each day it is estimated it fished.

The estimated total catch of each tribe is derived by multiplying the estimated total lifts by the "average" catch for each estimated lift. This procedure surely cannot give rise to new information. There are three supposed unknowns here: total catch, number of lifts, and average catch per lift. If total catch and number of lifts are known (or reasonably estimated), the average catch per lift can be determined. The estimates of total lifts here appear to assume that each observed unit continued to fish in the same place during the times they were not monitored. If total catch is unknown,

which it must be if new information is sought, the "average catch" is but another estimate, perhaps based on observations during inspections. But, it is not responsible to extrapolate from the average catch during inspections to the catch during every hypothetical lift. The tables display too great a variation in the supposed average catch and in the proportion of lake trout to whitefish. For each two-week period a single ratio of lake trout to whitefish is assigned to each tribe and ascribed to every additional lift. It varies for successive week periods by as much as 450% within a single grouping of Indians. And, within two-week groupings, the plaintiffs here allegedly took up to 10 percentage points difference in percentage of lake trout. The catch per effort (calculated in pounds) assigned to the various groupings differs within two-week periods for a single plaintiff tribe by up to 350%.

Another curious aspect of Keller's testimony is that he did not focus upon the gill net tugs referred to in paragraph 16 of his affidavit. Paragraph 16 was clearly intended to create the impression that the tug catch was additional and separate from the catch reported in paragraph 15 and attachment A. Yet, even in Attachment A there is a footnote referring to large gill net tugs, indicating that the fishing effort of those tugs is included in the figures of the Attachment and paragraph 15 of the affidavit. Where they are included, nothing which would add up to the 41,000 pounds of lake trout and 212,000 pounds of whitefish ascribed to them in paragraph 16 appears, the total catch of the Ottawas during the footnoted period being set at 4,416 and 12,288

for each species, respectively. (The Ottawas are not parties here, this title being reserved by Keller for a group of Indians other than the Grand Traverse Band.) If the figures for the September 16-30 period include monitored tugs and yet reveal so small a catch, the inflated estimates for the "six large tugs" in paragraph 16 is wholly mystifying, and, despite the protestation that only half were monitored, it is likely that the estimates for the tugs in paragraph 16 involve the same sort of extrapolation described above when discussing Attachment A generally.

Were it not for the general unreliability of Witness Keller's testimony, I would make greater effort to place the catch described in paragraph 16 either within or without the figures in paragraph 15. The catch reported by wholesalers is of little additional help because Keller admitted that the reported purchases can be ascribed to the area only on the basis of monitoring reports, an interpretation involving the same sorts of judgments described above.

The only useful figures are those provided by the Bureau of Indian Affairs. They are based upon the sort of data which the State calls "the most reliable in the world" when supplied by its licensed fishermen. In addition, use of these figures avoids having to exclude the fish caught by Keller's "Ottawa" classification. The Bureau of Indian Affairs figures that, as of September 30, 1979, members of the plaintiff tribes had caught 88,930 pounds of lake trout and 309,665 pounds of whitefish in Zone MM-4.

Keller made the claim, startling on its face, that a 50% depletion of lake trout spawning stock had taken place in Grand Traverse Bay by August 30. It must first be recognized that a 50% reduction of the spawning stock per year was not

regarded as outrageous by the Ad Hoc Working Group. In fact, such a reduction was considered as a management option permitting maximum harvest consistent with maintaining an ongoing spawning population. The State manages Zones MM-5, 6 and 7, and MH-1 without regard for this 50% set aside. Keller's affidavit reports that 96,000 pounds of trout 25 inches or over would constitute half of the spawning stock in Grand Traverse Bay. In fact, only a total of 88,930 pounds of fish of all sizes was taken. From the testimony of Haas regarding the non-selectivity of gill nets, far less than 100% of these fish would be 25 inches or over. (Assessment catches indicate that from 40-94% of the lake trout caught in Grand Traverse Bay have been of this size during the five years ending in 1978). Because the Indian trout were taken with gill nets, the only effective limit on the size of the catch was the vulnerability of the trout to the gill net, a size much closer to 17 inches than to 25. According to the Ad Hoc Working Group, where the take extends to trout of only 17 inches, only 100,880 pounds of trout result in a 50% reduction of spawning stock. Keller's statement that a 96,000 pound take would reduce the spawning stock by 50% is taken from figures of the Ad Hoc Working Group which assumes that only fish 25 inches or longer are kept. The 88,930 pound catch withdrawn from Grand Traverse Bay by September 30 would reduce the spawning stock by about 40% rather than the 50% reported by Keller by August 30.

Keller stated that he believed a 50% reduction would seriously harm the spawning stock but would not render spawning impossible. There was no evidence that a 40% reduction would render spawning impossible. The Ad Hoc Working Group regarded a 50% reduction as acceptable.[5]

---

[5]

Keller submitted substantially the same evidence as he provided here to a Grand Traverse County Circuit Court in August of last year. This evidence was submitted by way of affidavit on behalf of private parties

who challenged Indian fishing as in violation of state environmental protection law. Not having the benefit of the cross-examination of this witness or evidence indicating that the fish stock in Grand Traverse Bay was not actually in jeopardy as a result of Indian fishing, the state circuit court entered a preliminary injunction which had the effect of excluding the Indians from the available catch of lake trout and whitefish in the area, a clear end run around constitutionally protected rights declared by this court.

Judge Boldt, faced with such hostile flanking movements in the state courts attacking his

[505 F Supp 484]

Note 5—Continued

decision concerning the fisheries in Washington, wrote the following decision, 459 F.Supp. 1020, 1028 (W.D.Wash.1978), which was appealed and affirmed in *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979):

DECISION, INJUNCTION AND ORDER RE STATE COURT INJUNCTIONS PREVENTING ENFORCEMENT OF CERTAIN DEPARTMENT OF FISHERIES REGULATIONS

(September 12, 1974)

Paragraph 5 of the Interim Plan and Stay Order entered by this court on March 22, 1974 (384 F.Supp. at 420), obligates defendants State of Washington, Washington Department of Game and its Director and Washington Department of Fisheries and its Director, (hereinafter "defendants") to make significant reductions in the non-Indian fishery as deemed necessary to achieve the objectives of the court's definition of Indian treaty fishing rights. In carrying out this order the court anticipated that defendants would promulgate and enforce regulations reducing the non-Indian fishery. Defendants have promulgated certain regulations establishing reductions in the non-Indian fishery but have been unable to enforce them by reason of certain directives and orders of the Thurston County Superior Court in *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, No. 50380, *Washington Kelpers Association v. Tollefson*, No. 50552 and *Puget Sound Gillnetters Association* v. *Tollefson*, No. 50757.

No additional or alternative regulations have been proposed by defendants. Therefore, it now appears that in order to effectuate the prior orders of this court and to preserve this court's jurisdiction over the subject

matter, further orders of this court are necessary to clarify the scope of the court's jurisdiction and of the duties imposed upon defendants under Final Decision # 1.

[1-5] The principal questions presented by plaintiffs' request are whether this court is empowered to protect its earlier rulings from incursions such as have taken place in the three state court proceedings referred to above and, if such jurisdiction exists, whether this court in its discretion should exercise said authority, and if so, in what form. This court fully adopts the legal arguments recited in Exhibit "A" attached to this order[3] as though fully set forth herein and refers particularly to the following cases cited therein: *Atlantic Coast Line; Thomason; Shelton; Donelon; Leiter Minerals; Alonzo* v. *U.S.; U.S.* v. *Wood.* Based upon the legal arguments and decisions referred to immediately above, this court is not only satisfied that it has jurisdiction to enjoin the state court proceedings referred to, within the express exceptions to the anti-injunction statute, 28 U.S.C. § 2283, but also believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the federal treaty rights declared therein.

[3] Exhibit A was a portion of Plaintiffs' brief and is summarized as follows:

The regulations and actions at issue here represent attempts by the state to conform to Paragraph 5 of the Interim Plan and Stay Order obligating them to make "significant reductions" in the non-Indian fishery in order to achieve Indian opportunities. By restraining such obligated reductions, the state court preliminary injunctions directly conflict with this court's earlier rulings. The questions now before this court are whether this court is empowered to protect its earlier rulings from such past and future incursions and, if so, by what means.

The power of the court to defend its judgments, even to the extent of restraining inconsistent state directives, is not seriously in doubt. This court has retained continuing jurisdiction to assure compliance with its judgment and decree. Conclusion of Law # 48 (384 F.Supp. at 405). That jurisdiction extends if necessary to staying state court judges.

The apparent clashes between state and federal courts presented here have been an inescapable ingredient of a dual court system since the early days of the Republic. *See* C. Wright, Law of Federal Courts, § 47 (2d Ed. 1970). Federal courts are reluctant to interfere with state court adjudications, a policy familiar and persuasive to this court. But

the policy is one of restraint, not abdication. It is expressed today in the "anti-injunction statute," 28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Section 2283 is not a jurisdictional statute as such, but rather is an embodiment of long-established principles of comity. *E. g., Hale* v. *Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939); *Smith* v. *Apple*, 264 U.S. 274, 44 S.Ct. 311, 68 L.Ed. 678 (1925); *Wells Fargo and Company* v. *Taylor*, 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205 (1920). Thus, the statute, its exceptions, and case law interpreting it are useful vehicles for discussing the court's powers in this case.

A. *A Federal Court May Act where Necessary in Aid of its Jurisdiction or to Protect or Effectuate its Judgments*

More than four years ago this court assumed jurisdiction over the question of what obligations the State of Washington owed to Indian tribes under the fishing rights provisions in the federal treaties. Final Decision # 1 made clear the obligation of the state to take action to assure treaty Indians an opportunity to harvest a greater number of fish in order to effect an equal sharing consistent with the language and intent of the treaties. This court specifically ordered the defendants to make reductions in

[505 F Supp 485]

Note 5—Continued

non-Indian fishing. Thus, this court has assumed jurisdiction over the subject matter which nonparties have attempted to bring before the state courts. And it has rendered decisions and orders which would be effectively frustrated by the state courts' inconsistent injunctive orders. This presents a clear case of violation of comity principles where a federal court can and must act to preserve its jurisdiction and to assure that its rulings will have meaning and will be heeded. The exceptions to the comity doctrine and to section 2283 "imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and

authority to decide that case." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970).

Cases are legion which affirm the exercise of a federal court's power to prevent state court action from interfering with federal jurisdiction and from undermining federal court judgments. Many of these cases arose in situations such as the present where a federal court had forged remedies to protect the rights under federal law of a disadvantaged minority, only to be called upon immediately to *defend its judgment from hostile flanking movements in the state courts.* An example is *Thomason* v. *Cooper*, 254 F.2d 808 (8th Cir. 1958) where the federal court enjoined use of a state court injunction that had been obtained to prevent a school board from enrolling white children in an integrated school to carry out earlier federal court integration order. *Accord, Grenchik* v. *Mandel*, 373 F.Supp. 1298 (D.Md.1973); *United States* v. *Texas*, 356 F.Supp. 469 (E.D.Tex.1972).

In *Montgomery County Board of Education* v. *Shelton*, 327 F.Supp. 811 (N.D.Miss.1971) a federal court, having limited protest activities during school hours, later enjoined a more restrictive ex parte state court decree secured by nonparties to the federal action. The federal court said that "the effect of the state injunction will be to undermine and interfere with the prior orders of this court and to limit our flexibility in dealing with the multiple and complex problems which almost inevitably arise in the wake of school desegregation." 327 F.Supp. at 815. *See also, Coffey* v. *Braddy*, 372 F.Supp. at 116 (M.D.Fla.1971) (federal court order regarding hiring practices in local fire department; attorney enjoined from pursuing sanctions for failure to comply with subsequently entered state court injunction); *Concerned Consumers League* v. *O'Neill*, 371 F.Supp. 644 (E.D.Wis.1974) (federal injunction in consumer picketing controversy issued directly against state court judge although state court action was first in time).

Labor disputes also have occasioned conflicts between federal and state adjudications. In *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971), the Supreme Court upheld a federal injunction sought by the National Labor Relations Board to restrain enforcement of a state court antipicketing order secured by the company before the federal agency acted on the union's unfair labor practice charges. *Accord, National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942) (granting injunction sought by NLRB restraining persons from further prosecu-

ing state court actions laying claim to funds payable to employees as back pay under federal court order).

Federal court injunctions also have been issued to effectuate judgments in cases outside of the sphere of major social conflicts. *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973), upheld an injunction to prevent relitigation of issues pertaining to track maintenance under the Federal Railroad Safety Act. The court explained: "While § 2283 was designed to ensure the state courts' adjudicative potency, its exceptions assure that the federal courts and their judgments will not be eunochized and that their muscularity will not be atrophied." 474 F.2d at 1114. See also *Treas* v. *Twentieth Century-Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969) (party enjoined from proceeding with state court suit in order to protect federal judgment awarding one-half of the royalties under an oil and gas lease); *Miller* v. *Climax Molybdenum Co.*, 96 F.2d 254 (10th Cir. 1938) (prosecution of state court suits affecting railroad properties in a way likely to threaten an ICC order enjoined); *Fresno* v. *Edmonston*, 131 F.Supp. 421 (S.D.Cal.1955) (state water rights proceedings enjoined on the theory, among others, that the "res" of the dispute was before the federal court).

We have here no unseemly race to the courthouse such as often characterizes efforts to enjoin pending or threatened state prosecutions. *Compare Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (granting injunction), with *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (denying injunction). This is a case where "the enjoining court, having previously adjudicated the case on the merits, would seem * * * in a better position to determine the extent and nature of duplication." Comment, 32 *U.Chi.L. Rev.*, 471, 474 n.17 (1965).

That which was so carefully decided by this court is hastily being undone by a series of proceedings hardly resembling contested cases. Each injunction issued has been without security and thus in clear violation of state law. *See Irwin* v. *Estes*, 77 Wash.2d 285, 461 P.2d 875 (1969); *Evar, Inc.* v. *Kurbitz*, 77 Wash.2d 948, 468 P.2d 677 (1970); RCW 7.40.080. In each case the state has virtually conceded the irreparable injury necessary for a preliminary injunction. Given the summary decision-making and leisurely pace towards any trial on the merits, these state injunctions effectively will determine whether there will be any significant re-

[505 F Supp 486]

Note 5—Continued

strictions on the non-Indian fishery in the coming year as decreed by this court. For all practical purposes the federal decision is facing suspension for another year without so much as a single witness being subjected to cross-examination in the state courts.

B. *Federal Statutes Furnish a Basis for the Court's Action*

There are at least two statutory authorizations for the type of order sought by plaintiffs. First, the All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." This authorization extends to granting injunctions against state adjudicative proceedings. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed.2d 396 (1943); *Fresno* v. *Edmonston, supra.*

A second statutory basis for an injunction is found in the civil rights acts. The court, in part, is exercising its jurisdiction under 28 U.S.C. § 1343(3) and (4) to redress the deprivation, under color of state law, of rights secured by the Constitution, laws and treaties of the United States. Under 42 U.S.C. § 1983 the remedy available for such deprivations includes equitable relief. The Supreme Court has held that 42 U.S.C. § 1983 in within the "expressly authorized" exception to 28 U.S.C. § 2283. *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

C *The United States and Indian Tribes Assert Superior Federal Interests Which Override the Comity Principle*

The United States, together with the plaintiff tribes, has initiated this request to protect the court's rulings from the interference of inconsistent state court directives. The Supreme Court has held that where an injunction is sought by the federal government, the inhibitions of § 2283 vanish. The purpose according to the Court, is "not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." *National Labor Relations Board* v. *Nash-Finch Co., supra.* The origins of this federal government exception to § 2283 are traceable to *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-226, 77 S.Ct. 287, 290, 1 L.Ed.2d 267 (1957), where Mr. Justice Frankfurter said:

> "The statute [§ 2283] is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw

> the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of § 2283 alone."[8]

As stated in *United States* v. *Wood*, 295 F.2d 772, 783 (5th Cir. 1961), *cert. denied* 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962):

> "Where the United States has instituted the suit we must assume that the considered judgment of the Attorney General has concluded that a violation of the national interest has taken place.

Here the United States, which stands in a guardian-ward relationship to Indians, has acted in pursuit of its special duties to protect their treaty fishing rights. Enforcement of such rights is a national goal of the highest order and clearly is a "superior federal interest." *See* President's Message to Congress, July 18, 1970.

In *Alonzo* v. *United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied* 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958), a federal district court enjoined prior state court proceedings against an Indian tribe and its officers involving rights to lands held by the tribe in restricted fee. The court of appeals upheld the federal court injunction under the superior federal interest doctrine of *Leiter*, finding that "since the United States is suing as a guardian of a dependent nation in discharge of a fiduciary duty, its right and duty to protect the interests of its wards may be even greater than it would be if it were suing in its own behalf with respect to its own lands." 249 F.2d at 197.

Superior federal interests have justified injunctions in many other contexts. *E. g.*, *United States* v. *Barrett*, 442 F.2d 642, 646 (4th Cir. 1971) (Federal Housing Act); *Brown* v. *Wright*, 137 F.2d 484 (4th Cir. 1943) (rent control); *United States* v. *Wood*, *supra* (voter registration).

The same reasoning that exempts federal plaintiffs from application of normal comity rules applies to Indian tribes. These tribes are not merely private parties in the sense that other civil litigants are. They appear here under 28 U.S.C. § 1362 as parties to treaties made with the United States. They are "distinct political communities," *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832), and stand in relation to the United States as "domestic dependent nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1837).

As a consequence, they have many attributes of sovereignty. For instance, they possess immunity from suits to which they do not consent in federal and state courts. *See United States* v. *U. S. F. & G. Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); *Thebo* v. *Choctaw Nation*, 66 F. 372, 375 (8th Cir. 1895).

The legislative history of 28 U.S.C. § 1362 shows that it was intended to permit Indian tribes to litigate issues in federal court on the same basis as if the government had instituted the action. See H.R.Rep.No. 2040, 89th Cong., 2d Sess. (1966) quoted in part in *Moses* v. *Kinnear*, 490 F.2d 21, 25 n.9 (9th Cir. 1973).

Recognizing this status of Indian tribes, the courts have applied the so-called "co-plaintiff"

[505 F Supp 487]

Note 5—Continued

rule to allow the tribes to stand in the shoes of the government for various purposes if they properly might have been co-plaintiffs with the United States. The Ninth Circuit Court of Appeals has applied this rule to allow suits by Indian tribes to enjoin assessment of state taxes which are prohibited from being brought by private parties under 28 U.S.C. § 1341, on the same basis that such suits are permitted when the United States is plaintiff. *Moses* v. *Kinnear, supra; Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972). *See also, Walker* v. *River Paiute Tribe* v. *Sheehan*, 370 F. Supp. 816, 821 (D.Nev.1973). *Cf. United States* v. *Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367, 330 F.2d 897 (9th Cir. 1964), 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683, in which the court found that Indian property rights could not be lost through laches or estoppel.

Because Indian tribes possess the essential aspects of sovereignty, normal consideration of comity applicable to private litigants do not apply to such tribes As such, the co-plaintiff rule should apply and the federal anti-injunction statute, 28 U.S.C. § 2283, should be no bar to the requested injunctive relief. *See National Labor Relations Board* v. *Nash-Finch Co., supra; Leiter Minerals* v. *United States, supra*, 352 U.S. at 220-225, 77 S.Ct. 287.

The matter of this court's power to act under the circumstances as well as the need for such action are beyond question. The only issue is how best to exercise the court's authority to protect the federal judgment with a minimum of friction.

[6] It is clear beyond reasonable question that the three state court injunctions referred to above have to some extent prevented defendants from complying with this court's order to make "significant reductions" in the non-Indian fishery in order to make available to treaty-right fishermen a sufficient portion of the harvestable resource to guarantee an opportunity for them to harvest 50% of said resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal court, and state court proceedings instituted by nonparties to this lawsuit cannot be allowed to frustrate either final determinations based on exhaustive research and evidence or the jurisdiction of this federal court.

Data submitted by the United States Fish and Wildlife Service, which includes Department of Fisheries statistics, indicate that through August 1974, with the exception of the Nisqually River chum harvest in January which, for management purposes would be considered part of the 1973 run, Indian fishermen in the case area in 1974 have caught less salmon of each species than they caught in 1973, both in terms of total numbers of fish caught and in terms of the percentages of Indian harvest as contrasted with total non-Indian commercial salmon, or 3.5% of the total as compared with 3,404,710 salmon harvested by non-Indian commercial interests; through August of 1974, Indians have harvested 89,402 salmon or 2.4% of the total as compared with 3,628,513 salmon harvested by non-Indian commercial fishermen; when the sport catch through August of 1974 of 837,099 salmon is included, the Indian share of the total harvest is 2.0%.

These figures illustrate in the most startling manner the gross inequities between Indian and non-Indian harvest, and the complete failure and inability of defendants to comply with this court's orders to make significant reductions in non-Indian fishing and to afford to Indians an opportunity to catch approximately 50% of the harvestable resource at their usual and accustomed grounds and stations. Because by their nature substantial fish resources will be lost for 1974 to plaintiff tribes if not harvested during the currently ongoing seasons, the immediate threat of substantial economic harm and serious hardship to many treaty-right fishermen convinces this court that prompt action is required to protect federal treaty rights that this court has

found are constitutionally guaranteed as the law of the land and to assure the viability of this court's Final Decision # 1, unless and until it be modified or reversed.

In all court litigation in which the United States has an interest, including cases involving the interpretation and application of treaties duly enacted as required by federal law and the national Constitution, the Attorney General of the United States, acting through the Justice Department and United States Attorneys, is the official authorized to speak and act for the people of the Nation in such matters. In this instance, the United States Attorney, presumptively in the national interest, has requested that this court enjoin enforcement of the injunctions issued in all three of the above-referred to state court proceedings. Plaintiff tribes, as descendants of signatories to treaties with the United States, have joined in that request.

Rather than consider the state court proceedings in toto, upon the record now presented this court finds it necessary to consider the injunctions separately and therefore will discuss each of them in the order of issuance. It must be recognized, however, that each of the three state court proceedings was instituted by litigants none of whom was a party to this federal court action. Additionally, none of those state court proceedings joined the United States or the plaintiff tribes, the real parties in interest who could be, if not irreparably, at a minimum grievously, injured by state court injunctions preventing enforcement of the Department of Fisheries regulations promulgated for the express purpose of making more fish

Note 5—Continued

available to treaty-right fishermen. Finally, at none of the state court hearings were witnesses interrogated nor was any of the hearings a full scale evidentiary hearing; only affidavits of the litigants were presented, not subject to cross-examination, and the state court judges could only act upon the materials presented to them.

Beyond question, the state court judges who issued the restraining orders involved herein performed their judicial functions in accordance with established law and practice in the state courts, and in an able and responsible manner beyond criticism in any particular whatever. However, it is clear from the cited authorities that the circumstances above recited can and should be considered by this court together with the full record before it, significant portions of which were not available to the state courts, in determining what action, if any, to take with regard to these state court proceedings.
459 F.Supp. 1028-33 (W.D.Wash.1978).

That the treaty catch was incremental upon the sports catch is not cognizable in these proceedings. This condition is wholly within the State's control. It is discriminatory to regulate the Indians but not the sportsmen, and unnecessary to stop Indian fishing until after the sportsmen have been stopped.

Although continued fishing at the rate evidenced this summer in Zone MM-4 might well call for increased tribal regulation, the record for the tribes in conservation matters, evidenced by their closing of Zone MH-1, indicates that should the present rate pose a threat to the stocks in Zone MM-4, the tribes can be expected to take appropriate steps to limit the take.

The appropriate whitefish withdrawal from MM-4 during 1979 was set at 50,000 pounds for purposes of an experimental fishery. In the State's proposed Indian fishery, an annual withdrawal of 100,000 pounds is set, the proposal having been presented to this court after the Indian fishing of last summer and presumably taking it into account. It is evident that in the State's estimation the stocks there remain in a condition which will support continued harvest. The 309,665 pounds of whitefish withdrawn by September 30, 1979 are outside the proposed sustained yield, but do not appear to have been excessive for a fishery which had been closed to commercial exploitation for years and which had a fish population dominated by abnormal numbers of larger, adult fish.

(iv) *Zones MM-5, -6 and -7.*

Zone MM-5 consists of those waters of Lake Michigan west of Grand Traverse Bay and south of the line drawn west from

Norwood to a line drawn west from Arcadia. MM-6 includes the waters of Lake Michigan south of a line drawn west from Arcadia to a line drawn west from Little Sable Point. MM-7 is made up of the waters of Lake Michigan south of a line drawn west from Little Sable Point to a line drawn west from Holland, Michigan.

The State did not allege that Indian fishermen are depleting the stocks of lake trout in Zones MM-5, -6 and -7. Almost no Indian fishing takes place there. No natural reproduction of lake trout takes place in these zones.

Witness Keller indicated that the sportsmen's withdrawals of lake trout in these zones are not inconsistent with natural reproduction. In fact, however, the estimated ports catch of lake trout in these areas during 1979, reduced by the factor of 5.5 recently adopted by the State, amounted to: Zone MM-5, 57,731 pounds; MM-6, 188,400

The above order of Judge Boldt enforcing reductions of the non-Indian catch by 50% were subsequently approved by the Supreme Court, Justice Stevens declaring that non-party actions before the state courts must not be allowed to stand in the way of federal court enforcement of its decrees.

> "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.
>
> * * * * * *
>
> The federal court unquestionably has the power to enter various orders that state officials and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court . . . . Even if those orders may have been erroneous in some respects, all parties have an unequivocal obligation to obey them while they remain in effect."

Washington v. Fishing Vessel Ass'n, 443 U.S. at 695-696, 99 S.Ct. at 3079-3080, 61 L.Ed.2d at 851-52.

pounds, and MM-7, 151,780 pounds. These 1979 figures duplicate the 1978 catch figures. Witness Kutkuhn, relying upon the Ad Hoc technical report off Lake Michigan, revealed that in Zone MM-6, 55,000 pounds would be the maximum take allowing for sustainability and a 121,000 pound withdrawal would amount to a put/grow/take fishery, a fishery sustained solely by planting. In Zone MM-7 a 35,000 pound catch would allow a self-sustaining population. A catch of 84,000 pounds would render the fishery put, grow and take. The sports catch exceeds even this. The State calls this fishery fully regulated. Zone MM-5 also exceeds the self-sustaining figures.

It would appear that the State of Michigan is fully willing to permit withdrawal of lake trout which prevents natural reproduction so long as that withdrawal is performed by non-Indians and so long as there is sufficient economic return.

(v) *Zone MH-1.*

Zone MH-1 covers the Michigan waters of northern Lake Huron south to a line drawn perpendicular to the International Boundary from Rogers City.

The State began stocking Zone MH-1 in 1973. The area was the focus of an intensive Indian fishery in the fall of 1978 and the spring of 1979, a time when the Indians, as a result of political pressure, had a self-imposed ban on fishing in Lake Michigan below Cross Village, and before allowable catch determinations had been established for the area. After this catch, the Ad Hoc Working Group determined that 3,000 pounds of trout were available under the put, grow and take option. Nevertheless, the Secretary and the tribes closed this area to all Indian fishing indefinitely, and the ban is expected

to be permanent. The State has not closed this area to sports fishermen, and estimates their catch for 1979 at 25,180 pounds. Dr. Kutkuhn testified that the State is managing this area on a put, grow and take basis. Despite this, during these proceedings, the State attempted to hold the Indian fishermen to the self-sustaining stock standard and to take the size of their catch as inconsistent with the State's goals.

State licensed commercial fishermen took 405,550 pounds of whitefish from this zone by September 30, 1979. Indian catch reports reveal a take of 178,948 pounds. The State's proposal offers the Indians 100,000 pounds of whitefish. The total allowable catch determined by the Ad Hoc Working Group is 550,000 pounds.

(vi) *Zone MH-2.*

Zone MH-2 covers Michigan waters of Lake Huron between lines drawn perpendicular to the International Boundary from Rogers City to Black River.

Little Indian fishing is taking place in Zone MH-2. Indian fishermen took 1,100 pounds of lake trout and 5 pounds of whitefish in 1979. Non-Indian fishermen took 80,384 pounds of whitefish and sportsmen took 22,545 pounds of lake trout. All totals are well within allowable catches. Lake trout are available here: 84,000 pounds to permit a self-sustaining stock and 123,000 pounds for a put, grow and take fishery. However, the State's proposal would ban the Indians from any take of lake trout and allocate them 100,000 pounds of whitefish.

(vii) *Zones MS-4 and -5.*

Zone MS-4 covers the Michigan waters of Lake Superior from a line running from Salmon Trout Point out to the International Boundary to a line drawn north from Beaver Lake.

Zone MS-5 is made up of the Michigan waters from Lake Superior between lines drawn north from Crisp Point and from Beaver Lake.

Indian fishing for lake trout and whitefish in Zones MS-4 and MS-5 is negligible. However, the state commercial whitefish take from MS-5 appears to be excessive.

Indian fishermen took 35,102 pounds of trout from MS-4 and 90 pounds from MS-5 in 1979. Sustained yield in MS-4 would permit a 118,00 pound take and MS-5 a 29,000 pound take. State-authorized fishermen took 8,363 pounds of lake trout from MS-5.

[505 F Supp 490]

In MS-4 Indian fishermen took 22,064 pounds of whitefish; non-Indians 37,829 pounds. The allowable catch is 10,000 pounds. In MS-5 Indians took 138,176 pounds; non-Indians 54,143 pounds. The allowable catch is 200,000 pounds.

The State proposes to protect these stocks by permitting the Indian fishermen to take 100,000 pounds of lake trout from MS-5. The only other catch permitted would be herring and chubs. Here the Indians would not even be allowed to fish for whitefish.

(viii) *Zone MS-6.*

Zone MS-6 is roughly equivalent to the Michigan waters of Whitefish Bay, although it extends west to a line drawn north from Crisp Point to the International border.

The State claimed that lake trout in MS-6 are in a state of depletion because of intensive Indian gill netting which began in the fall of 1974.

Planting of lake trout began in MS-6 in 1962. Until 1973 plantings reportedly averaged 200,000 in Whitefish Bay alone. After that, the plantings were reduced to 100,000 in 1974, and then to less than 30,000 for the following three years.

The State's case against Indian gill netting is based upon a decline in the assessment fishing index, the C.P.E., from 1974 to 1975, and a decline in the total catch by licensed commercial fishermen.

The declining catch reports are of little help in evaluating the lake trout stocks. These catch reports are provided, Schorfaar's affidavit says, by assessment fishing by licensed commercial fishermen. Yet, the Department of Natural Resources began making the assessments itself in 1976. Full catch reports apparently are not provided, since in 1979 a C.P.E. of 1.66 is reported, but the catch report is zero. Either failure to report the catch or changes in assessment procedures are reflected for the years 1973-74. In 1973 a catch of 5,152 pounds is reported, with a C.P.E. of 32.30. In 1974, the reported catch is 3,278 pounds, with a C.P.E. of 53.27, significantly higher than the year before.

The fact is, the sampling effort has varied radically over the years. In 1973, 48,000 feet of net were set; in 1974 only 15,000. But, this limited effort is used to establish a peak on the C.P.E. graph, which is then shown to decline precipitously. The bias is also reflected in the extraordinary 1974 catch from a single year class, the 1968 class, with other year classes already—before extensive gill netting—showing the decline which is reflected in subsequent years of sampling. Only the 1968 class continues to appear in high numbers, until 1978, when it too has nearly disappeared.

The 1974 sampling is critical to determine the cause of the reduced catches in subsequent years, yet it is inadequate. It

suggests some independent factor operated to lower the stocks in MS-6 in that year, the commercial assessment fisherman focusing his efforts so as to maximize his catch and then abandoning his task.

One possible cause of the decline is a drop in the natural reproduction rates. This would leave fewer fish available for recruitment into the fisheries. The 1978 catch does not appear to eliminate this hypothesis with respect to MS-6.

The decline in lake trout in Whitefish Bay appears to reflect a general decline in the population across the southeastern shore of Lake Superior, whatever might be the cause. The Ad Hoc Working Group provides a table exhibiting the C.P.E. for lake trout age seven and older for various years. In 1971 this C.P.E. was 37 for MS-5, and 2.4 for MS-6. By 1978, the MS-5 C.P.E. is down to 10 and the MS-6 C.P.E. is down to .8. The relative decline in MS-6 is lower than in MS-5.

Fishing pressure in MS-6 has relaxed this year as a result of the opening of other waters to treaty fishermen. If wholesale reports are presumed accurate, 23,088 pounds of lake trout were taken from Whitefish Bay in 1978, but only 11,000 pounds had been taken from Zone MS-6 by August 31, 1979. This direction makes it unnecessary for this court to intervene.

[505 F Supp 491]

The Ad Hoc Working Group suggested that any withdrawal of lake trout from Whitefish Bay would be incompatible with the goal of restoring a self-sustaining population in the zone. It proclaims its own data indicating a total allowable catch from Zone MS-6 of 3,100 pounds of lake trout over 21 inches, if wholly sustained by planting, unuseful as a management guide. This estimate apparently was based on a hypothesis of an admittedly high mortality rate. In fact, the report's

conclusion regarding the standing stock would make reported catches impossible. It appears that the 3,100 pounds estimate also assumes continued planting at present, token rates. It is also based upon a population reduced by state policy decisions to make only such token plantings.

In its proposed Indian fishing allotment, the State allows 20,000 pounds of lake trout to be taken from Zone MS-6, the allotment being based on a native population of fat lake trout in the western end of the zone. The Ad Hoc report does not appear to take this population into account, for it does not authorize any such withdrawal from anywhere in the zone. The present levels of catch do not exceed this estimate of the available catch, nor did the evidence establish that no part of the present catch comes from this native stock.

Although the present levels of withdrawal of lake trout from Zone MS-6 may be excessive the evidence presented does not adequately establish this at the present time, and Indian catches are declining significantly. The evidence did not establish that the gill netting beginning in 1974 is the only cause of the decline in the stocks in Whitefish Bay. Greater effort by the State in restocking the Bay would permit harvest at present rates and even permit the harvest to increase. State withdrawal from the lake trout stocks by reduction of plantings has exceeded the reduction brought about by the Indian catch. Unknown factors brought about the decline even before Indian treaty fishing pressure began in 1974.

The State estimates that the sustained yield for whitefish in Whitefish Bay is 200,000 pounds per year. The State has not shown regulation of the Treaty fishermen is necessary. The treaty fishery has never exceeded this amount. The state licensed fishery has often exceeded it. The State can avoid

any excessive pressure on the whitefish resource by setting quotas for its licensed fishermen, a step which it has yet to take.

D. The State's Showing of Irreparable Harm.

The State's evidence for each of the statistical zones reveals that it has utterly failed to show that Indian fishing has irreparably harmed lake trout, whitefish and other targeted species in the Michigan waters of the Great Lakes. Only in the case of lake trout was there any serious effort to establish this contention.

The State's basic objective here is to hold the Indians to the standards of its preferred management plan. Depletion is initially understood as a condition which harms the State's policy of fostering recreational fishing. The State knows politically and economically that it must allow a substantial harvest of lake trout by state licensed recreational fishers. State regulators like the recreational fisher, find him or her easier to regulate and more willing to accept Department of Natural Resources rules and requirements. Department of Natural Resources officials believe the motives of the angler—relaxation and recreation—more worthy and to their liking than the Indians who are motivated by a desire to feed their families.

The State also attempted to hold the Indian plaintiffs to standards which would apply if the lake trout stock were self-sustaining. Yet, depletion as a biological condition was not made out. When Indian fishing is measured against standards set out by the Ad Hoc Working Group, standards which would allow for a suitably sized population of potentially spawning fish, the Indian fishermen more frequently fish at rates which permit such a population than

[505 F Supp 492]

do state licensed fishermen. Indian withdrawals exceeded the total allowable catch for a self-sustaining lake trout population in Zones MH-1, MM-3, MM-4 and MS-3. Even in MM-3 and MH-1 the Indian take was well below the take which would render the fishery put, grow and take. The tribes have now closed MH-1 to all fishing. There is a problem about the statistics for MS-6. Avoidance of clustering would overcome the problems. The state licensed sport fishery greatly exceeds the take permitting even a put, grow and take lake trout fishery in Zones MM-6 and MM-7. State sports fishermen alone exceed the self-sustaining allocation in MM-5, almost exactly doubling it. In addition, the State continues to authorize lake trout fishing in MH-1, and when their take is added to the Indian take, it exceeds even the put, grow and take option.

There is no zone where the Indian whitefish catch exceeds the allowable catch. However, the State sometimes permits its licensed fishermen to withdraw totals which, when added to those of the Indians, exceed the allowable catch.

Indian fishing may very well interfere with the sports fishery. However, the State's management plan is rooted in economics. A strong recreational fishery enhances the State's economy. But, the State may not simply carry out this policy. The State did not challenge the fact that the Indian tribes have treaty-protected and aboriginal rights to fish in the Great Lakes. When these rights are acknowledged, the present levels of Indian take are generally within acceptable levels.

While it appears that Indian fishing pressure may have been over-intense in certain areas of the Great Lakes, it is clear that the Indian tribes, together with the Secretary are actively

engaged in regulating the fishery in such a way that this will be prevented in the future, without interfering with the Indian's right of self-regulation.

INDIAN TRIBAL REGULATION

The State maintained that the Indians' use of the gill net is unlimited, and that this will ultimately lead to the collapse of the fisheries resources, and that the conservation codes of the tribes and the Secretary's regulations are nothing more than licenses allowing slaughter of lake trout, whitefish, coho salmon, and other species. The above review makes clear that this has not happened at the present time. The issue now considered is whether this will inevitably occur.

This court rejects the various curves submitted by the defendants to describe the Great Lakes fishery. These curves are based on unregulated, international fisheries and fisheries of the late 19th and early 20th centuries. There is no reason to believe that they represent the Indian fisheries of our time, where national and tribal governments limit individual effort, and these governments are no longer blinded by the myth of limitless resources. Nor are the curves helpful in describing present conditions in the Great Lakes, since, until the fish begin naturally reproducing, State planting efforts can be so manipulated as to duplicate the arch of these curves.

Berg testified about tribal fishing regulations and the Secretary's regulations of November 15, 1979, found in 25 C.F.R. Sub-part D (Ex. P-301). The Secretary's regulations were formulated pursuant to a Memorandum of Understanding reached between him and the tribes. (Ex. P-308.) Draft regulations were prepared by the tribal chairmen, their attorneys, and Fish and Wildlife officials (9 Tr. 1575). The draft regulations were commented on by State officials who attended at least one drafting meeting (9 Tr. 1575). Thereafter, the tribes met,

discussed and adopted the regulations which were then sent to the Secretary of the Interior for his consideration (9 Tr. 1575). He in turn made some changes and published the regulations in the Federal Register (9 Tr. 1576-77).

The purpose for these regulations is to protect the fishery resource during the 1980 season (9 Tr. 1578). They are subject to change, as the need requires.

The pertinent provisions of the Secretary's regulations were summarized by

[505 F Supp 493]

Berg beginning at 9 Tr. 1579. Treaty fishermen are identified by cards issued by the tribes and the Bureau of Indian Affairs (9 Tr. 1580; 25 C.F.R. § 256.44). Catch reports showing fishing locations, total catch, type of gear and the like are required under 25 C.F.R. § 256.45 (9 Tr. 1581). Limitations on fishing activities are found in 25 C.F.R. § 256.46. Zone MH-1 is closed to all tribal fishers (9 Tr. 1583). Grand Traverse Bay south of the 45th parallel is also closed (9 Tr. 1584). Most of Little Traverse Bay is closed (9 Tr. 1584). The Lower St. Mary's River is closed to treaty fishers, as well (9 Tr. 1584). The regulations also contain restrictions on the size gill nets that permissibly may be used in areas of Lake Michigan (9 Tr. 1584). Target fishing for sport species and species listed by the Secretary as threatened and endangered is prohibited (9 Tr. 1586). Although lake trout is not defined as a sport species, there are harvest restrictions. If the catch of lake trout in any lift exceeds 20 percent of the total catch by weight, the individual making the lift shall not set nets in the same grid area for a period of ten days (9 Tr. 1588).

Spawning closures in Lakes Huron, Michigan and Superior are provided for in 25 C.F.R. § 256.46(d) (5 Tr. 1588). Further, nets may not be set within one half mile of the mouth of any rivers suitable for spawning (9 Tr. 1588).

In order to deal with emergency situations that arise during the fishing season, a joint emergency regulatory committee has been provided for (9 Tr. 1589). The committee consists of tribal chairpersons, conservation committee chairpersons and one licensed commercial fisher from each tribe. 25 C.F.R. § 256.47(a). If the committee does not take suitable action when required, the area director of the Bureau of Indian Affairs is authorized to do so in the committee's stead (25 C.F.R. § 256.57(b), 9 Tr. 1590).

Berg testified that in his opinion as an expert biologist, the Secretary's regulations were adequate to protect the fishery resource in the Great Lakes, at least for the immediate future (9 Tr. 1591). The regulations were designed to be modified from one fishing season to the next. Further, Berg wanted to see them strengthened so as to close the entire St. Mary's River, not just the lower portion and to require some type of catch reports from subsistence fishermen (9 Tr. 1591-94). Only commercial fishermen had to submit catch reports to the tribes. Berg's conclusion that the regulations adequately protect the resource was based in part on the fact that the State manages the lake trout fishery on a put and take basis in several areas in the Great Lakes (9 Tr. 1594). Since there is no significant natural reproduction of lake trout from planted fish, it makes little difference to the resource who harvests the fish (9 Tr. 1594).

On April 28, 1980, these regulations were updated further, the tribes and the Secretary taking significant new steps for protection of the resource. 45 Fed. Reg. 28100. These regulations authorize seizure of equipment and gear for violations

of the regulations, require catch reports 10 days after the close of the month, and require subsistence fishers to submit catch reports; the arrest power is expanded; all of the St. Mary's River is closed; a sanctuary is created below Fox Islands; no whitefish below 17 inches in length can be kept; depth restrictions on small mesh gill nets are adopted; the spawning closure of Lake Superior is expanded to include all of November; and, in a step which the State has shown unwillingness to adopt, treaty takes of whitefish and bloater chubs are limited in terms of the total allowable catch and lake trout takes are limited by the management option allowing sustained yield.

Berg took an informal survey on the number of tugs used by all tribal fishermen and concluded the number was approximately ten (10 Tr. 1630). However, of this total number, only four or five are operational at any particular time due to the delapidated condition of the tugs and their constant state of disrepair (10 Tr. 1630-31).

With regard to gill net selectivity, Berg testified, contrary to the testimony of state witnesses, that there is a significant differ-

[505 F Supp 494]

ence between length frequencies of lake trout taken by 3.5 inch versus 4.5 inch gill nets (10 Tr. 1613). Similarly, there is a statistically significant difference between length frequencies of lake trout taken by a 4.5 inch versus 5.5 inch gill net (10 Tr. 1613).

A. [Mr. Richard Berg] I simply feel that there is no real solid evidence in this [Haas] report that lake trout are vulnerable to all sizes of mesh with regard to their life [sic] [length].

Q. [Mr. Bruce R. Greene] So that you are saying that a gill net will be somewhat selective even with respect to lake trout?

A. Significantly so, yes.

Q. But, you are also saying, I gather, that it would be more selective for whitefish because of the bony structure of lake trout in comparison to whitefish. Is that correct?

A. That is correct.

Testimony of Richard E. Berg (Direct), (10 Tr. 1613). Further, according to Berg, a 5.5 inch gill net is sufficiently selective to allow lake trout and whitefish to reach first year spawning maturity. (10 Tr. 1615).

It is clear from the above that the Indian fishery is not "unregulated" and that Indian regulations compare favorably with State regulations. To mention just a few of the matters brought up by the State: the Indian fishermen supply catch reports just as do state licensed fishermen. The State, together with the federal government, has most of the data regarding the stocks. Director Tanner, despite his acknowledgment that it is theoretically possible for the State and the tribes to regulate side by side, declared that he was opposed to releasing State data to the tribes, even if it is indispensible to them if they are to set reasonable catch quotas. There is no obvious reason why the Indians should be required to duplicate these State and federal efforts.

Neither the State nor the Indians generally employ quotas. The State sets quotas only for certain experimental commercial operations. It claims that its creel limit on sports fishermen has a similar effect on total catch. The Indians impose similar restrictions on their fishermen, limiting the total incidental catch of lake trout, when targeting for whitefish, to 20%.

The Indians have a quota of zero pounds for targeted lake trout. The United States, the tribes, and the State have authority to set quotas for fishermen under their jurisdiction. The State has more of the information needed to set responsible quotas, but appears to find quotas unnecessary at the present time or to consider its data inadequate. The State has not set general quotas and asked the tribes to adopt them.

Although the State indicated that selective gear may be absolutely necessary to protect endangered species, it did not proceed to demonstrate that gill nets cannot be so regulated as to provide the necessary protection. The evidence showed that the gill nets used by the Indians do result in an incidental catch of non-targeted species, with lake trout the principle victim. The tribes regulate the net mesh size, a factor which controls the frequency of catch of various sizes of lake trout and can exclude other species.

Entry into the Indian fishery is limited to members of the Indian tribes. About 200 tribal members have been licensed, compared to 130 state fishermen. I do not find it unreasonable that the tribes have not yet imposed a limitation on the number of licenses available and only indirectly limit them by the imposition of a sizeable fee. Given the part-time nature of the Indian fishery, it appears that the State and tribes similarly evaluate the carrying capacity of the lakes.

The tribes have begun radical zoning, declaring entire statistical zones off limits and excluding vast areas. The seasons adopted by the tribes coincide with those of the State.

STATE PROPOSAL FOR REGULATION OF INDIAN FISHING

The proposal submitted by the State to show the court its concept of State regulation of Indian fishermen conclusively demonstrates its inability to comprehend its responsibility to its Indian citizens. Even if

[505 F Supp 495]

the State had made out that the stocks had been irreparably harmed, that the fishery is unregulated and that gill net fishing necessarily leads to biological depletion, this court could not authorize the State to regulate according to this plan.

Under the plan, allocations are made to Indians from available fish supplies after the demands of the State's 130 licensed commercial fishermen are satisfied, the stocks are generally protected for sportsmen and all lake trout, with the exception of a few in Lake Superior, are delivered to the sportsmen. Other than the chub fishery, which has been closed to state licensed commercial fishers for several years and which is unsuitable for the type of gear possessed by Indian fishermen, the Indians have been allocated species that no one else wants, has previously caught, or is currently catching. (Tr. 1455). According to Tanner and Scott, the State's largess is limited to providing the Indians with "left overs." Notwithstanding the Indians' prior and paramount aboriginal federally protected right to fish in the Great Lakes, the State adheres steadfastly to the view that the tribes are interlopers, interfering with its perceived mandate to manage the resource for the principal benefit of state recreational fishers, for the secondary benefit of state licensed commercial fishers, and last and least, for treaty right fishers, provided however that State fishers are not disrupted. Indian fishermen would be obliged

to provide for a self-sustaining stock of lake trout, even though the State does not require this of its sportsmen. They could not engage in any fishing, except for chubs and Lake Superior lake trout, until after they had found the capital and acquired the training necessary to operate sophisticated equipment which would replace their gill nets and make it impossible for them to continue fishing in small crews.

The State initially seeks to limit the number of Indian fishermen who can exercise the tribal rights, as it has limited the number of licenses which it offers its own commercial fishermen. The State objective is to foster the fishery by drastically limiting the number of fishermen and making it "extremely profitable" for those who remain. This goal is mandated by this hardnosed view that the fishery is made up of fishermen out to make a "killing," to become wealthy, at the expense of the fishery. This model is in turn adopted from laizze faire economics—from the motivations it supposes, to the hypothesis of no government regulation on which it depends. Such dogmatics are of little use here. The Indian fishery reveals a tradition of part-time fishermen who pool limited capital so as to get a favorable return from small individual takes. Regulation, whether exercised by the tribes, the State or the federal government, modifies the behavior of men, even if it is supposed that their only motivation is economic gain.

The State attempted to justify its proposed regulations on the grounds that they would provide a moderate standard of living for perhaps 40 fishermen fishing with the State's preferred, expensive and non-traditional gear. When it came to demonstrate how even these 40 could make a living, it became clear that it would be necessary to ignore even basic expenses. No witness attempted to state a dollar amount each of the 40

could expect, or what a moderate standard of living is. They were nevertheless quite able to declare that these fishermen could have one.

The proposed regulations are grossly discriminatory against the Indians in denying them their traditional gear, even without a showing that the stocks cannot sustain the take which these nets would capture. *Puyallup II*. It is discriminatory in allocating the lake trout to sportsmen and demanding of the Indian that he fish in such manner that he will not take any of the lake trout which the State acknowledges are available for harvest. *Puyallup II*. It is not necesary to regulate Indian fishermen when those without treaty rights are still permitted to withdraw vast amounts of fish from the same waters and the Indians are deprived of them. Even under an allocation system, where treaty fishers are required to contribute to preser-

[505 F Supp 496]

vation of the species in the first instance, Indian fishermen are granted some initial proportion of available fish and non-treaty fishers are obliged to limit their catch accordingly. In Washington rivers and waters, where Indians explicitly hold their right in common with all other citizens in the territory, the Indians are entitled to no less than 45-50% of the available take. The State of Michigan seeks all of the fish its non-treaty fishermen want and presently take. It then graciously offers the remainder to the Indians. A more effective denial of treaty rights can hardly be imagined. It must not be forgotten that the Indians preserved unabridged one hundred percent of their aboriginal right to take fish, while the State fishermen have only a privilege. This is the law of the Constitution.

CONCLUSION

The State's application for a stay is denied. The State has failed to show likelihood that it will succeed in establishing that it can regulate its Indian fishermen like any of the other of its citizens. The State must acknowledge that the Indians of Michigan have aboriginal and treaty-secured rights to fish in the waters of Michigan, and it cannot exclude those Indians from their livelihood or prevent them from taking available fish by their traditional fishing methods. Once the standards defining the treaty rights of Michigan Indians are set forth, it is clear that the State has not made out that Indian fishing must now be extra-tribally regulated lest it be irreparably harmed during the appeal of this action. State regulation now would undermine the constitutionally authorized congressional policy of fostering Indian sovereignty just when the tribes are expending their control over their own fishermen. A stay pending appeal would alter the status quo, which is that Indian fishing is not regulated by the State at the present time. The regulations which the State proposed are wholly inconsistent with the Indian treaty right, discriminating against them, denying them the use of traditional gear, excluding them from most of the fishery so that it may be preserved for sportsmen and other state licensees. The gill net, properly regulated, was not shown to be inconsistent with the restoration of lake trout, for the State contends some of the trout can be taken. Its principal objection is that it would rather have these fish caught by sportsmen.

Motions by all parties for admission of exhibits into evidence are granted.

[623 F2d 448]

UNITED STATES of America,
Plaintiff-Appellee,

Bay Mills Indian Community,
Plaintiff-Intervenor-Appellee,

Sault Ste. Marie Tribe of Chippewa Indians,
Plaintiff-Intervenor-Appellee,

v.

STATE OF MICHIGAN, Michigan Natural Resources Commission and its agents, Dr. Howard A. Tanner, Director of the Department of Natural Resources; Dr. Henry Vondett, Chief, Fisheries Division, Department of Natural Resources; and George Dahl, Chief, Law Enforcement Division, Department of Natural Resources, (No. 79-1414), Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF MICHIGAN, Michigan Natural Resources Commission and its agents Dr. Howard A. Tanner, John A. Scott and Frank P. Opolka, Defendants,

Thirteenth Judicial Circuit Court of the State of Michigan, Intervenor-Appellant,

Grand Traverse Area Sport Fishing Association, (Nos. 79-1527 & 79-1528), Intervenor-Appellant.

Nos. 79-1414, 79-1527 and 79-1528.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 15, 1980.

Decided May 28, 1980.

• • •

[623 F2d 449]

Before MERRITT and BOYCE F. MARTIN, Jr., Circuit Judges, and PECK, Senior Circuit Judge.

PER CURIAM.

On May 7, 1979, District Judge Noel Fox issued an opinion and a declaratory judgment, *United States* v. *Michigan*, 471 F.Supp. 192 (W.D.Mich.1979), in an action brought by the United States and two Indian tribes in Michigan, the Chippewa and the Ottawa tribes (represented by the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians) against the State of Michigan and certain state officials. That case is now pending before us as appeal No. 79-1414. The District Court held that under treaties entered into between the United States and the Chippewa and Ottawa

tribes in 1836 and 1855, 7 Stat. 491 (1836), 11 Stat. 621 (1856), these tribes have unique, exclusive, off-reservation rights to engage in gill net fishing in waters of Lake Michigan, despite Michigan laws to the contrary. The District Court held that these treaties grant the Indians an absolute right to engage in gill net fishing in these waters free from any regulation by the State of Michigan or any limitations of time, place or manner generally applicable to other citizens, even if such gill net fishing completely destroys fisheries, fish supplies and spawning grounds in Lake Michigan.

Having found in case No. 79-1414 that the state has no power to limit Indian fishing rights in any way, District Judge Fox in two other cases designated here as appeals Nos. 79-1527 and 79-1528, (consolidated for argument before us with case No. 79-1414) enjoined certain Michigan officials from interfering with Indian gill net fishing and enjoined certain Michigan state judges from proceeding any further in a state court action to determine the right of Indians to engage in gill net fishing in Grand Traverse Bay and from issuing a temporary restraining order against such pending disposition of the state action.

On September 26, 1979, Judge Albert Engel of this Court stayed Judge Fox's order against the state judges until October 25, 1979, pending consideration of the stay by a full panel of this Court under Rule 8 of the Federal Rules of Appellate Procedure. For the reasons stated by Judge Engel in his order of September 26, 1979, we continued in effect the stay of District Judge Fox's order pending disposition of the appeals in these cases. We found on the basis of the record before us that unless the order is stayed there is a strong possibility that the fishery, the fish supply and spawning grounds in Grand Traverse Bay will be irreparably damaged or destroyed by continued intensive gill net fishing. We further concluded, tentatively, in assessing the likelihood of appellant's success

on the merits, that the reasoning of the Supreme Court of Michigan in *People* v. *LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) appears to correctly state the law applicable to gill net treaty fishing by Indians in the Great Lakes. That case held that the State may regulate gill net fishing if necessary to preserve fish from extinction or prevent irreparable damage to fish supplies or destruction of fisheries.

Since the decisions of the District Court in these cases and after this Court stayed the injunctive orders of the District Court, the Secretary of the Interior issued comprehensive regulations governing Indian fishing in the Great Lakes, including gill net fishing, under treaties entered into between the United States and Indian tribes. The regulations are comprehensive. 25 C.F.R. Part 256 (subpart 1), 44 Fed. Reg. 65747. They ban or restrict treaty fishing in certain areas, regulate net mesh size, prohibit

[623 F2d 450]

harvest of threatened or endangered species and designated sport species, prohibit fishing during the spawning season, prohibit the setting of nets in certain locations at certain times of year, and provide for emergency regulatory adjustments in the regulations.

Both the Indian tribes and the government argue that, even assuming that state law would otherwise govern Indian fishing rights, these new regulations occupy the field with respect to treaty fishing and make general state fishing laws no longer applicable. The District Court has not addressed or decided this preemption issue or the effect of the new federal regulations on the responsibility, authority and jurisdiction of state officials and state courts in the enforcement of the new federal regulations and state laws relating to the subject.

Article I, Section 8 of the Constitution provides that Congress shall have the power "to regulate Commerce . . . among the several States and with the Indian Tribes." Section 2 of Title 25, U.S.C. gives the Secretary of the Interior "the management of all Indian affairs and of all matters arising out of Indian relations" and Section 9 of Title 25 authorizes the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." The new regulations were issued under the authority of these statutes. Since Congress adopted in 1836 and 1855 acts in the form of the treaties with the Ottawa and Chippewa Indians, the government's preemption argument has a firm constitutional and statutory basis.

This Court cannot, however, intelligently consider and decide the preemption question and its effect on state jurisdiction (an extremely important issue that may make a decision unnecessary on the other issues presented in this appeal) in the absence of a decision by the District Court on three questions concerning the meaning and effect of the new federal regulations: (1) Were the new regulations intended to have, and do they have, the effect of preempting all state regulation of treaty fishing? (2) If so, do the new regulations prohibit enforcement by state officials? (3) If so, do the new regulations oust the state court of jurisdiction to control Indian fishing rights or does the state court retain concurrent jurisdiction with the federal court? The parties have not briefed the second and third questions. The answer to these questions may depend in part on the existence of viable tribal councils capable of enforcement. The taking of proof may be necessary.

For these reasons, we remand the case to the District Court for consideration of the preemptive effect of the new federal regulations. The District Court should consider this question on the assumption that the case of *People* v. *LeBlanc*, 399 Mich.

31, 248 N.W.2d 199 (1976) correctly states the applicable law in the absence of preemptive federal regulations. Although this Court has not finally decided the issue, it is presently inclined to the view, as it was when it issued the stay in these cases, that, in the absence of federal regulations occupying the field, the Supreme Court of Michigan in *People* v. *LeBlanc*, *supra*, has correctly stated the applicable standard governing state regulation of gill net fishing.

Accordingly, the case is remanded to the District Court for consideration of this question. This Court retains jurisdiction of the other questions presented by the case pursuant to 28 U.S.C. § 2106 and continues in effect the stay heretofore entered.

FILED DEC. 5, 1979

JOHN P. HEHMAN, Clerk

No. 79-1414

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, et al, Plaintiffs-Appellees v. STATE OF MICHIGAN, et al, Defendants-Appellants	

Before: MERRITT, Circuit Judge.

ORDER

This case is before a single judge of the court pursuant to the application of the State of Michigan under Rule 8, Federal Rules of Appellate Procedure, for a partial stay of the judgment entered in this case May 7, 1979. The State of Michigan requests the stay pending consideration of the appeal on the merits. The same application for a stay is before the District Court, and the Court is informed that the District Court will conduct an evidentiary hearing on the issue beginning December 6, 1979.

Rule 8 of Federal Rules of Appellate Procedure provides that application for a stay of the judgment or order of a District Court "must ordinarily be made in the first instance in the District Court." The rule continues:

> A motion for such relief may be made to the Court of Appeals or to a judge thereof, but the motion shall show that application to a District Court for the relief sought is not practicable, or that the District Court has denied the application, or has failed to attend the relief which the applicant requested, with the reasons given by the District Court for its action.

In light of the language of this rule, together with the fact that the District Court is presently considering the same question, we believe that it would be inappropriate for this Court to enter a stay of the District Court's judgment of May 7, 1979, at this time. There is no showing that the relief sought in the District Court is "not practicable" or that the District Court has "denied an application" for the same relief.

Therefore, the application for stay of the District Court's declaratory judgment of May 7, 1979, is hereby denied without prejudice to the rights of the parties to apply to this Court after the District Court has ruled on the application for stay.

ENTERED BY ORDER
OF THE COURT

John P. Hehman /s/

John P. Hehman
Clerk

FILED DEC. 14, 1979

JOHN P. HEHMAN, Clerk

No. 79-1414

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, BAY MILLS INDIAN COMMUNITY; SAULT ST. MARIE TRIBE OF CHIPPEWA INDIANS, Plaintiffs-Intervenors-Appellees, v. STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION AND ITS AGENTS, DR. HOWARD A. TANNER, DR. HENRY VONDETT AND GEORGE DAHL IN THEIR OFFICIAL CAPACITIES, Defendants-Appellants.	

ORDER

Upon consideration of the defendants-appellants' application for partial stay of judgment pending appeal and request for immediate consideration,

And it appearing that these matters are presently pending before the district court,

It is ORDERED that the application be denied.

ENTERED BY ORDER
OF THE COURT

John P. Hehman /s/

John P. Hehman, Clerk

FILED MAY 30, 1980

JOHN P. HEHMAN, Clerk

No. 79-1414

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, BAY MILLS INDIAN COMMUNITY, Plaintiff-Intervenor-Appellee, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Plaintiff-Intervenor-Appellee, v. STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents, DR. HOWARD A. TANNER, Director of the Department of Natural Resources; DR. HENRY VONDETT, Chief, Fisheries Division, Department of Natural Resources; and GEORGE DAHL, Chief Law Enforcement Division, Department of Natural Resources Defendants-Appellants.	

ORDER

Before: MERRITT, Circuit Judge.

The state of Michigan and its agents have applied for a stay of the District Court judgment in this case pending appeal. The District Court ruled, in a decision issued on May 7, 1979, that the state of Michigan lacked authority to regulate fishing by the Bay Mills Indian community and the Sault Ste. Marie tribe of Chippewa Indians in the territorial waters of the state. This Court on May 28, 1980, remanded the case to the District Court for a decision on the question of federal regulatory preemption. We retained jurisdiction over the other issues presented. For the reasons set forth below, the judgment of the District Court is stayed pending final disposition of this appeal.

This is the third time that an application for a stay in this case has been presented to this Court. On the two previous occasions, the motions were denied because the state and its agents had not first pursued the motion to the fullest practicable extent in the District Court, as Federal Rule of Appellate Procedure 8(a) requires: *See* Orders of December 5, 1979, and December 14, 1979. Although a motion to stay had been pending below in both prior instances, the District Court had not yet acted. On May 9, 1980, the District Court after prolonged consideration denied the application for a stay. The District Court having acted, this Court now is prepared to entertain the motion for a stay in case 79-1414.

In three companion cases, we have stayed the judgment of the District Court pending appeal. In cases 79-1527 and

79-1528, Judge Engel of this Court stayed the permanent injunction that the District Court had issued against the Thirteenth Judicial Circuit Court of Michigan. *See* Order of September 26, 1979. A three-judge panel of this Court on October 19, 1979, continued the effectiveness of the stay pending disposition of the appeal. What we stayed in cases 79-1527 and 79-1528 was the District Court decree that forbade the state court to proceed any further with a state injunctive action brought by the Grand Traverse Area Sport Fishing Association against gill net fishing in the Grand Traverse Bay area of Lake Michigan.

In case 79-1635, a three-judge panel of this Court on November 28, 1979, likewise granted a stay pending appeal. The stay in 79-1635 suspended a temporary restraining order issued by the District Court. The TRO had applied the principles of the decision in the present case—No. 79-1414—to the Grand Traverse Band of Ottawa and Chippewa Indians, in addition to the Indian plaintiffs herein. Our stay in 79-1635 temporarily barred the extension of the May 7, 1979, District Court decision to the Grand Traverse Band.

We granted the stay in cases 79-1527 and 79-1528 in order to avert the strong possibility that intensive gill net fishing by the Bay Mills Indian community and the Sault Ste. Marie

tribe of Chippewa Indians would irreparably damage the piscatorial ecosystem of Grand Traverse Bay. The stay in 79-1635 was a product of our concern that excessive gill net fishing by the Grand Traverse Band could work similar irreparable damage throughout Michigan's territorial waters. Our apprehensions are no less warranted in the present case, which leaves fishing by the Bay Mills Indian community and Sault Ste. Marie tribe of Chippewa Indians unfettered by state regulation throughout the territorial waters of the state of Michigan.

Accordingly, the judgment of the District Court is stayed pending final disposition of the appeal of case 79-1414.

ENTERED BY ORDER

OF THE COURT

John P. Hehman, Clerk

By Grace Keller /s/
Deputy Clerk

Filed July 16, 1980, John P. Hehman, Clerk.

Nos. 79-1414, 79-1527, 79-1528

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
BAY MILLS INDIAN COMMUNITY,
Plaintiff-Intervenor-Appellee,
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff-Intervenor-Appellee,
v.
STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents, DR. HOWARD A. TANNER, Director of the Department of Natural Resources; DR. HENRY VONDETT, Chief, Fisheries Division, Department of Natural Resources; and GEORGE DAHL, Chief, Law Enforcement Division, Department of Natural Resources, (No. 79-1414),
Defendants-Appellants.
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiffs-Intervenors-Appellees.
v.
STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents, DR. HOWARD A. TANNER, JOHN A. SCOTT and FRANK P. OPOLKA,
Defendants,
THIRTEENTH JUDICIAL CIRCUIT COURT OF THE STATE OF MICHIGAN,
Intervenor-Appellant,
GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION,
(Nos. 79-1527 & 79-1528),
Intervenor-Appellant.

Before: MERRITT and MARTIN, Circuit Judges;
PECK, Senior Circuit Judge.

The United States and the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians have moved the Court to vacate and set aside its stay heretofore entered pursuant to the Court's opinion of May 28, 1980, and in the alternative to modify the stay. The Grand Traverse Area Sport Fishing Association has also moved the Court to clarify the opinion so as to insure that the Association may participate as a party in the proceeding on remand to District Judge Fox.

I.

This Court declines to vacate or set aside its stay heretofore entered. The Court does, however, modify the stay as follows: Indian treaty fishing, including gill net fishing, in that portion of the Great Lakes over which the State of Michigan claims jurisdiction to enforce its fishing laws shall be governed during the pendency of this litigation in the District Court and in this Court by the comprehensive regulations issued on this subject by the Secretary of the Interior contained in 25 C.F.R. part 256, 44 Fed Reg. 65747 (November 15, 1979), as amended, 45 Fed. Reg. 28100 (April 28, 1980) and as such regulations may hereafter be amended by the Secretary of the Interior, provided, however, that "enforcement officer," as defined in § 256.41(e) thereof, 45 Fed Reg. 28102, shall include conservation officers of the State of Michigan and such other law enforcement officers of the State of Michigan as are authorized under state law to enforce the fishing laws of the State of Michigan.

This Court's modification of its stay heretofore entered is based on the standard outlined in *Reed v. Rhodes*, 549 F.2d 1046 (6th Cir. 1976), after considering the recent Supreme

Court decisions in *White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897 (No. 78-1177, decided June 27, 1980) and *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 48 U.S.L.W. 4904 (No. 78-1604, decided June 27, 1980).

II.

The Court has also considered the motion of the Grand Traverse Area Sport Fishing Association to clarify its status as a party in the proceedings on remand together with the order of the District Court on this subject entered July 9, 1980. This Court finds that the Association is a party to this litigation and has a direct interest in the outcome thereof. The District Court should allow the Association to participate as a party in the proceeding in the District Court on remand and allow the Association to conduct discovery on the same basis as other parties.

Accordingly, it is so ordered.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN /s/
Clerk

RECEIVED APR 24 12:01 PM '81

OFFICE OF THE GOVERNOR

United States Department of the Interior

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20240

Honorable William G. Milliken
Governor of Michigan
Lansing, Michigan 48901

Dear Governor Milliken:

The decline of the carefully restored fisheries of the Great Lakes is a matter of vital concern to this Department and it is clear that the tremendous pressures brought to bear by commercial, sport, and Indian fishermen on those fisheries are the principal cause of the decline. As a result of these pressures, various species, particularly Lake Trout, are suffering serious declines. The continued decline of these important species will reduce them to levels where another extremely costly, long-term restoration program will be necessary. To permit such a decline following years of costly restoration would be an unprecedented violation of the Department's fish and wildlife conservation mission, our responsibility for tribal treaty rights, and our stewardship of the Nation's natural resources.

The continued necessity for the the current treaty fishing regulations issued in 1979, and subsequently extended on December 31, 1980, should, in view of these circumstances, be reevaluated. Evaluation by the Fish and Wildlife Service indicates that the program provided by the regulations may be failing to protect these fisheries which are vital to Indians and non-Indians alike. Consequently, I do not intend to ex-

tend these regulations beyond the May 11, 1981, expiration date.

In the absence of federal regulations and during the period in which the courts proceed with a resolution of the legal aspects of the matter, conservation of the fishery must be ensured. Accordingly, I invite you or your designated representative to attend a meeting in Washington, D.C. It is my hope that a program acceptable to all parties, which will ensure the safety of valuable fish stock and the Tribes' treaty fishery, can be created. Upon completion of a consensus management program, I propose that it be carried out by the parties in a manner which recognizes the concurrent responsibilities and duties of the State of Michigan, the Tribes, and the Department of the Interior.

During the period between the expiration of the current regulations and development of a consensus program, I believe —in accordance with the stated inclinations of the United States Court of Appeals for the Sixth Circuit Court—the reasoning of the Supreme Court of Michigan in *People v. LeBlanc* appears to correctly state the law applicable to fishing by Indians in the Great Lakes. Again, my primary concern is that the fishery not be permitted to decline while we await a definitive resolution of the legal issues.

I trust that our meeting will be the first step toward achieving an equitable resolution to the problems now threatening the rights of the respective parties and a nationally recognized natural resource—the Great Lakes Fishery.

Sincerely,

Jim Watt /s/

Jim Watt
SECRETARY

Filed July 10, 1981, John P. Hehman, Clerk.

No. 79-1414
No. 79-1527
No. 79-1528

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiffs-Intervenors-Appellees,

v.

STATE OF MICHIGAN, MICHIGAN NATURAL RESOURCES COMMISSION and its agents, Dr. Howard A Tanner, Dr. Henry Vondett and George Dahl in their official capacities,
Defendants-Appellants,

GRAND TRAVERSE AREA SPORT FISHING ASSOCIATION, 13th JUDICIAL CIRCUIT COURT OF THE STATE OF MICHIGAN,
Intervenor Defendant-Appellant.

Before: MERRITT, MARTIN and JONES, Circuit Judges.

ORDER

The procedural history of this Indian treaty fishing rights case is recited in our opinion reported at 623 F.2d 448 (1980), remanding the case to the District Court to determine whether federal regulations governing gill net fishing preempt state regulation. After the remand of the case to the District Court last summer pursuant to that opinion, the following significant steps have occurred: (1) The District Court began taking proof on the preemptive effect of the regulations of the Secretary of the Interior governing gill net fishing in the Great Lakes issued last year during the pendency of the original appeal in this case, but the District Court has not ruled as yet on the questions referred to it in our opinion. (2) The Secretary of the Interior allowed the regulations in question to expire on May 11 of this year, apparently on grounds that he and the Bureau of Indian Affairs should defer to the states in connection with the regulation of Indian treaty fishing in the Great Lakes. (3) The State of Michigan has issued emergency regulations governing gill net fishing which appear to be less protective of Indian rights than the federal regulations. (4) The State of Michigan has moved that the order of remand be vacated and that the original judgment of the District Court be reversed. (5) This Court heard reargument of the case on June 19, 1981.

In light of these events, this Court concludes as follows:

1. The treaty-guaranteed fishing rights preserved to the Indians in the 1836 treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the

protection of those rights. The responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government.

2. The right of the Indians to engage in gill net fishing is not absolute, however. It is subject to a rule of reason. In the absence of federal regulation, that right is subject to the type of state regulation outlined by the Michigan Supreme Court in *People* v. *LeBlanc*, 248 N.W.2d 199 (1976), a decision which we believe accurately states the rule of reason and the principles of federal law applicable to this case. As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

3. Thus if Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing. Since the new Secretary of the Interior has now withdrawn the regulations issued by his predecessor, the essential question is now whether these standards have been satisfied.

4. The parties have not introduced proof on this subject, and the state has not carried the burden described in the paragraph immediately preceding. Accordingly, this Court

is not in position at this time to determine whether the state's new regulations meet federal standards. We therefore decline to approve and put into effect on an interim basis the more restrictive emergency regulations of Indian treaty fishing recently adopted by the State of Michigan.

5. The United States and the Indian tribes represent to the Court that the tribes have adopted and will carefully enforce as a regime of tribal self-regulation the comprehensive rules regarding gill net fishing previously enacted by the Secretary of the Interior which were allowed to expire on May 11, 1981. Until modified by the District Court upon remand, the comprehensive rules regarding gill net fishing previously enacted by the Secretary of Interior and referred to in our opinion reported at 623 F.2d 448 (1980) and our order of July 16, 1980, will remain in effect as the interim rules regarding gill net fishing. The District Court may modify these rules on an interim basis under Rule 65, Federal Rules of Civil Procedure.

6. The remand opinion and orders of this Court dated May 28, 1980, and July 16, 1980, remain in effect except as modified by this order. The District Court shall consider and decide in accordance with the principles outlined herein and in *People v. LeBlanc*, 248 N.W.2d 199 (1976), the questions of necessity and irreparable harm. Only upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation of gill net fishing. If the District Court should find after hearing evidence that state regulation and control of Indian treaty fishing is necessary to preserve the fish of Lake Michigan as a resource, then the District Court should sanction state regulation. In that event, the District Court should permit those state regulations necessary to prevent irreparable harm as heretofore stated.

7. With respect to state court jurisdiction over cases involving Indian treaty fishing, we agree with the arguments and position of the United States presented on June 19, 1981. While these questions concerning Indian treaty rights and the degree of permissible state regulation are pending in this Court and in the District Court, it is improper under the supremacy clause of the United States Constitution for the state courts to make orders inconsistent with those of the federal courts. Thus, the District Court's injunctions in cases No. 79-1527 and 79-1528 continue to be appropriate. Those orders were issued by the District Court in aid of its jurisdiction to determine the rights of the parties under treaties of the United States. The state cases were brought after the federal case was pending and under consideration, and the orders of the state courts in those cases had the effect of interfering with and obstructing the orderly adjudication of the federal questions in the District Court. The doctrine of abstention therefore does not apply.

Accordingly, the remand order of this court embodied in our opinion reported at 623 F.2d 448 (6th Cir. 1980) is continued in effect as modified by this order.

ENTERED BY ORDER OF
THE COURT

John P. Hehman /s/
Clerk

ISSUED AS MANDATE: AUGUST 11, 1981

COSTS: NONE

A TRUE COPY

Attest:

JOHN P. HEHMAN, Clerk

By Audrey Crockett /s/
Deputy Clerk

Filed, August 18, 1981 Clerk John P. Hehman.

UNITED STATES OF AMERICA

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	M26-73 C.A.

OPINION

On May 28, 1980, the United States Court of Appeals for the Sixth Circuit issued an Order which remanded this case to the district court to consider the meaning and effect of new federal regulations on this Indian treaty fishing dispute. Since this court's opinion of May 7, 1979, the Secretary of the Interior had issued comprehensive regulations governing Indian fishing in the Great Lakes, including gill net fishing.[1] The Indian tribes and the government argued before the Circuit Court that, even assuming that state law would otherwise govern Indian fishing rights, these new regulations occupied the field with respect to treaty fishing and made general state fishing laws no longer applicable. Since this court had not addressed or decided the effect of these regula-

[1] The Secretary of Interior's regulations are contained in 25 C.F.R. part 256, 44 Fed. Reg. 65747 (November 15, 1979), as amended, 45 Fed. Reg. 28100 (April 28, 1980).

tions on the power and authority of the state, the matter was remanded to this court to consider and answer the following questions:

> (1) Were the new regulations intended to have, and do they have, the effect of preeempting all state regulation of treaty fishing?
>
> (2) If so, do the new regulations prohibit enforcement by state officials?
>
> (3) If so, do the new regulations oust the state court of jurisdiction to control Indian fishing rights or does the state court retain concurrent jurisdiction with the federal court?

The Sixth Circuit Court stated that the answer to these questions may depend in part on the existence of viable tribal councils capable of enforcement, and the taking of proofs may be necessary. *United States* v. *Michigan*, 623 F.2d 448, 450 (6th Cir. 1980).

Several telephone conferences were held in an attempt to expedite the discovery process. The State originally proposed taking depositions of twenty-one Interior officials. Subsequently, this list was narrowed down, and ultimately no depositions took place.

On July 16, 1980, the Sixth Circuit Court issued an Order which clarified Grand Traverse Area Sport Fishing Association's (GTASFA) status in the remanded proceedings. In addition, that Order modified a previously entered stay, and allowed treaty fishing under the Secretary of Interior's regulations. The State then filed a petition under the All Writs Act, 28 U.S.C. § 1651, with the U.S. Supreme Court, requesting the July 16th Order be lifted and the May 30th stay Order

reimposed. Associate Justice Byron R. White refused this extraordinary request, and left undisturbed the three-judge panel's Order of July 16, 1980.

Trial on the remanded proceedings began on September 30, 1980 in Marquette. Nine days of testimony were heard. Various tribal witnesses testified concerning the existence of enforcement mechanisms. Evidence regarding tribal conservation codes, tribal enforcement efforts, and tribal courts was received. While many spoke about past difficulties in working with the State, the general feeling of the tribal witnesses was that the regulations were working, were effective, and had reduced the tension that had often existed when the State was regulating.

Eric Jankel, Special Assistant to Secretary Andrus, testified about the facts, circumstances, and history surrounding the issuance of treaty fishing regulations. Mr. Jankel was in court and cross-examined on September 30th, October 16th, 17th and 24th. On November 3, 1980, with all counsel present in chambers, this court wanted to clarify a few points Mr. Jankel had made by asking him some questions during a telephone conference. Despite the fact that all counsel had four different occasions to view Mr. Jankel's demeanor, substantial amounts of time and money would be saved, and telephone conferences have been used successfully in other courts, *see* Gottschalk, *Courts Calling on Telephones to Economize*, The Wall Street Journal, June 1, 1981, at 29, col. 3, the State threatened to appeal. To avoid further prolonging the proceedings, additional questioning of Mr. Jankel was not undertaken.

In late October, a treaty Indian fisherman was found in contempt of state court for engaging in activity that the Circuit Court had authorized in its July 16, 1980 Order. The State's Thirteenth Judicial Circuit, in *GTASFA* v. *Maudrie, et al.*,

File No. 79-7510 C.E., found Patrick G. Kinney in criminal contempt for fishing under the federal regulations in violation of a fourteen-month old ex-parte restraining order. This district court was petitioned to enjoin the state court charge, and on November 13, 1980 a preliminary injunction was entered.[2]

The regulations contained in 25 C.F.R. part 256, 44 Fed. Reg. 65747 (November 15, 1979), as amended, 45 Fed Reg. 28100 (April 28, 1980), were interim rules promulgated by the Secretary of Interior and were scheduled to expire on their own terms on January 1, 1981. By that time, it was anticipated that permanent rules would be in place. With the election and upcoming change of Administrations, however, tremendous political pressure was brought to bear on the situation. Rather than adopting permanent rules, the Carter Administration, through Secretary Andrus, extended the regulations to May 11, 1981. 46 Fed. Reg. 33 (January 2, 1981). This extension maintained the status quo pending the beginning of the 1981 fishing season. The Notice in the Federal Register stated that it was anticipated that regulations governing treaty fishing would be published in April.

With the change of Administrations, political pressure was again applied to end the federal regulatory scheme and give the State control over treaty fishing. On April 20, 1981, Michigan Congressman Guy Vander Jagt's office revealed the Secretary's decision to let the regulations lapse. By identical letters sent to the Chairmen of the Tribes and the Governor, Secretary Watt announced his decision not to renew the fed-

---

[2]

A similar fact pattern was presented to this court in March 1981. At the hearing for a preliminary injunction held on March 19, 1981, counsel for the state court judge and GTASFA threatened to prosecute other treaty fishers for obeying the Sixth Circuit Court Order of July 16th. (Transcript of Proceedings, March 19, 1981, p. 11, 41). As in the Kinney matter, a preliminary injunction was issued.

eral regulations. Despite eight years of the government's urgings to the contrary,[3] the Secretary stated that the reasoning of *People* v. *LeBlanc* accurately states the law applicable to treaty fishing. The Secretary invited the parties to meet in an attempt to work out a "consensus management program," which would recognize the concurrent responsibilities and duties of the State, the Tribes, and the Department of the Interior.

In light of these developments, the State filed an emergency motion with the Sixth Circuit Court to set aside the remand order, and to put in place the State's "emergency regulations" as an interim measure to replace the lapsed federal regulations. Rather than petition the district court, which still had jurisdiction to consider the remand issues, the State requested immediate consideration from the Sixth Circuit. A phone conference was held on April 30, 1981 to apprise the district court of these maneuverings. On June 19, 1981 oral arguments were heard by the Circuit Court in Cincinnati.

On July 10, 1981, the United States Court of Appeals for the Sixth Circuit issued an Order. First, that Order recognized that Indians possess aboriginal rights to fish. These rights continue to the present day, as preserved in the Treaty of

---

[3]

This suit was filed in April 1973 by the United States of America, under the authority of the Attorney General, and at the request of the Secretary of the Interior. Due to arrests, prosecutions, threatened prosecutions, and the threat of confiscation of personal property by the State, the right of treaty Indians to fish had been frustrated, and the health and economic well-being of their families had been seriously affected. The United States sought a declaration that treaty Indians possessed an aboriginal right, confirmed by the treaty, to fish, and that the State of Michigan did not have the right to control or regulate fishing of tribal members. (See: Complaint For Declaratory Judgment and Permanent Injunction, filed April 9, 1973, and attached hereto as Appendix A.) This was the policy the United States consistently followed from the Nixon Administration until April 20, 1981.

1836. The Court added that the protection of these rights is the solemn obligation of the federal government, and no principle of federalism required the federal government to defer to the states in connection with the protection of these rights.

Second, the July 10th Order stated that in the absence of federal regulations, *People* v. *LeBlanc*, 399 Mich. 31 (1976), accurately states the rule of reason applicable to this case. The Circuit Court cautioned, however, that "only upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation of gill net fishing." Order, Slip Op. 5, July 10, 1981. Unless the state meets these criteria, they may not regulate at all. If the state meets these criteria, any regulations must (a) be a necessary conservation measure, (b) be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen. Order, Slip Op. 3, July 10, 1981. In the interim, the tribes can self-regulate[4] and the District Court is given power to modify the regulations.

The third significant announcement in the July 10th Order is that this court's injunction against the state court (*GTA-SFA* v. *Maudrie, et al.*, File No. 79-7510, in the Circuit Court for the County of Grand Traverse) continues to be appropriate. The Sixth Circuit Court recognized that while questions concerning Indian treaty rights and the degree of permissible state regulation are pending in federal court, it is improper under the supremacy clause for a state court to

---

[4]

The tribes had previously adopted the Secretary's regulations as part of their tribal conservation codes. Despite the Secretary's decision to allow the regulations to lapse, they remain tribal law, and are binding on all treaty tribe fishers.

make orders inconsistent with those of the federal courts. The doctrine of abstention does not apply where this court's Orders were in aid of jurisdiction, the state case was brought after the federal case was pending, and the orders of the state court had the effect of interfering with and obstructing the orderly adjudication of the federal questions in the District Court. Order, Slip Op. 5, 6, July 10, 1981.

A status conference was held on July 23, 1981 by this court to consider procedures on the Order of Remand. This court, after giving full consideration to all parties, concludes as follows:

(1) That the remand to this court to consider the preemptive effect of the Secretary of Interior's regulations contained in 25 C.F.R. part 256, 44 Fed. Reg 65747 (November 15, 1979), as amended, 45 Fed. Red. 28100 (April 28, 1980) is moot. The actions of the Secretary to allow the regulations to lapse removed the constitutional requirement of a "case or controversy" (Article III, United States Constitution). The fact that the Tribes have adopted the federal regulations as part of their Conservation Codes, and the Circuit Court has sanctioned this form of regulation still renders any consideration by this court of the May 28, 1980 "three questions" an advisory opinion. There is a fundamental distinction between active administrative regulations, and court sanctioned interim rules. Therefore, this court need not, and cannot address the merits of the questions posed to it in the earlier remand.

(2) Counsel for the State of Michigan advised this court that they have no present intention to meet the burdens outlined in the July 10, 1981 Order, necessary to regulate treaty fishing. This court therefore, retains jurisdiction under the July 10th Order to consider and decide in accordance with the principles outlined in that Order and in *People* v. *LeBlanc*,

supra, the propriety of any future attempts by the State to impose regulations upon treaty fishers.

(3) This court retains jurisdiction to modify the current rules regarding treaty tribe fishing on an interim basis, under Rule 65, Federal Rules of Civil Procedure, as the need may arise.[5]

---

[5]

This court has stated that it does not want to assume the role of a "perpetual fishmaster." See: 508 F.Supp. 480, 486 (W.D. Mich. 1980). However, the inability of the parties to negotiate, or to litigate in the District Court has meant that this court must continue to assume a role in Great Lakes fishing. The initiation of "hostile flanking actions," state prosecutions of treaty fishers for compliance with federal court orders, various attempts to avoid the court system by seeking political solutions in Washington, and the frequent trips to the Sixth Circuit Court have only served to postpone and delay these already lengthy proceedings. While not wanting to become a "perpetual fishmaster," this court must continue its role in this dispute, if the need arises. District judges cannot escape their constitutional responsibilities by ignoring problems of avoiding issues. (See Justice McLean's concurring opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 571-2, 8 L.Ed 483 (1832), where, in describing the duty of the Court, he stated:

> ". . . if this court should shrink from a discharge of their duty, in giving effect to the supreme law of the land, would they not violate their oath, prove traitors to the constitution, and forfeit all just claim to the public confidence?"

The United States Courts exist to ensure guaranteed constitutional rights against the tyranny of popular majorities, 471 F.Supp. 192, 205 (W.D. Mich. 1979), and while that is not always an easy task, it is one that must be accepted. Lawyers and public officials have a similar duty to the Constitution.

Dated: August 18, 1981.

NOEL P. FOX /s/

Noel P. Fox, Senior Judge
United States District Court
Western District of Michigan

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

GERALD H. LIEFER, CLERK

By MARY HAMTAK /s/
Deputy Clerk

Date Aug. 18, 1981

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- STATE OF MICHIGAN, Defendant.	No. M 26-73

COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

The United States of America, by John Milanowski, United States Attorney for the Western District of Michigan, acting under the authority of the Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. § 1345.

2. The United States brings this action in its own behalf and in behalf of the Bay Mills Indian Community which is a tribe or a band of Indians recognized as such by the Secretary of the Interior.

3. The United States has entered into treaties with the tribe or band mentioned in paragraph 2, including the Treaty of March 28, 1836, with the Ottawa and Chippewa Nations of Indians. (7 Stat. 491).

4. The Bay Mills Indian Community is organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). These Indians are still under the protective arm of the United States. Hunting, fishing, trapping, and gathering fruits of the land were essential methods of obtaining food for the very existence of these Indians at the time this treaty was entered into, and plaintiff alleges that the right to hunt, fish, trap, and gather fruits of the land are aboriginal rights which were confirmed by the Treaty of March 28, 1836. Included in these rights was the right to fish in the waters of Lake Superior.

5. Defendant has been, for a number of years, interfering with the rights of the Bay Mills Indian Community to fish in the waters of Lake Superior by enforcing the fishing laws of the State of Michigan against members of the Bay Mills Indian Community.

6. Due to arrests by the defendant and subsequent prosecutions and pending prosecutions in the State Courts of Michigan, as well as threats of further arrests and prosecutions, and the threat of confiscation of personal property, members of the Bay Mills Indian Community are not able fully to exercise their treaty-protected rights as mentioned in paragraph 4. The inability of members of the Bay Mills Indian Community to exercise their treaty-protected rights has seri-

ously affected the health and economic well-being of their families by sharply reducing the availability of fish from Lake Superior which has been a traditional source of food for subsistence and income.

7. Plaintiff alleges on information and belief that the above-mentioned acts of the defendant in the enforcement of its fishing laws against members of the Bay Mills Indian Community as to their fishing in Lake Superior is the result of defendant's interpretation of the Treaty of July 31, 1855 (11 Stat. 621), as abrogating those rights confirmed by the Treaty of March 28, 1836. Plaintiff further alleges that the defendant, its officers and agents, acting under color of State law, have no jurisdiction to enforce any State statute in such manner as to prevent the Bay Mills Indian Community from exercising its treaty-protected rights.

8. The plaintiff has no adequate remedy at law because:

(a) The damages which have been and will be sustained by the Bay Mills Indian Community, and the members thereof, are not susceptible of monetary determination;

(b) The rights of the Indians to hunt, fish, trap, gather fruits of the land, and to exercise other treaty rights confirmed by treaties with the United States are unique and should be specifically protected; and

(c) In the case of criminal prosecutions pending or threatened by the State or its officers purporting to act under the authority of State statutes, these Indians have no remedy at all except at the risk of suffering fines or imprisonment, involving multiplicity of legal proceedings.

WHEREFORE, the plaintiff prays for judgment as follows:

1. Determining and declaring that the Bay Mills Indian Community has an aboriginal right confirmed by treaty, which may be exercised through its members, to fish in the waters of Lake Superior.

2. Determining and declaring that the State of Michigan does not have the right to control or to regulate fishing by the Bay Mills Indian Community or members thereof within the waters of Lake Superior.

3. Enjoining the defendant, its agents and employees, from enforcing the fishing laws of the State of Michigan against the Bay Mills Indian Community or members thereof while fishing within the waters of Lake Superior.

4. For such other and additional relief as the plaintiff may be entitled to, in accordance with equity and good conscience.

5. For the costs of this action.

Dated: April 9, 1973

UNITED STATES OF AMERICA,

By JOHN MILANOWSKI /s/

John Milanowski
United States Attorney for the
Western District of Michigan

Business Address:
544 Federal Building
Grand Rapids, Michigan 49502

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	M26-73 C.A.

ORDER

In accord with the accompanying opinion, this court concludes as follows:

(1) The remand to this court to consider the preemptive effect of the Secretary of Interior's regulations contained in 25 C.F.R. part 256, 44 Fed. Reg. 65747 (November 15, 1979), as amended, 45 Fed. Reg. 28100 (April 28, 1980) is moot. The actions of the Secretary to allow the regulations to lapse removed the constitutional requirement of a "case or controversy" (Article III, United States Constitution). The fact that the Tribes have adopted the federal regulations as part of their Conservation Codes, and the Circuit Court has sanctioned this form of regulation still renders any consideration by this court of the May 28, 1980 "three questions" an advisory opinion. There is a fundamental distinction between active administrative regulations, and court sanctioned interim rules. Therefore, this court need not, and cannot address the merits of the questions posed to it in the earlier remand.

(2) Counsel for the State of Michigan advised this court that they have no present intention to meet the burdens outlined in the July 10, 1981 Order, necessary to regulate treaty fishing. This court therefore, retains jurisdiction under the July 10th Order to consider and decide in accordance with the principles outlined in that Order and in *People* v. *LeBlanc*, *supra*, the propriety of any future attempts by the State to impose regulations upon treaty fishers.

(3) This court retains jurisdiction to modify the current rules regarding treaty tribe fishing on an interim basis, under Rule 65, Federal Rules of Civil Procedure, as the need may arise.

IT IS SO ORDERED.

Dated: August 18, 1981.

NOEL P. FOX /s/

Noel P. Fox, Senior Judge
United States District Court
Western District of Michigan

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

GERALD H. LIEFER, CLERK

By MARY HAMTAK /s/

Deputy Clerk

Date August 18, 1981

Opposition

1

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS
CLERK

No. 81-549

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the respondent tribes, consisting of Chippewa and Ottawa Indians, possess rights guaranteed by treaty with the United States to fish in areas of Lakes Superior, Michigan and Huron which they ceded to the United States in 1836.

2. Whether, if the tribes have such rights guaranteed by treaty, the State of Michigan may regulate fishing by the Indians only when the application of the regulations to the Indians is necessary for the conservation of the fishery, does not discriminate against the Indians, and is the least restrictive means of effectively preserving the fishery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
1. Background	2
2. The Michigan Supreme Court's decision in *People* v. *LeBlanc*	4
3. The district court's decision	6
4. The Secretary's regulations	6
5. The district court's denial of a stay pending appeal	8
6. The court of appeals' orders	9
7. The proceedings in district court on remand	11
Argument	12
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 17
Antoine v. *Washington*, 420 U.S. 194 22
Bay Mills Indian Community v. *United States*, 26 Ind. Cl. Comm. 538 18
Department of Game v. *Puyallup Tribe*, 414 U.S. 44 ..... 8, 15, 20, 22
Menominee Tribe v. *United States*, 391 U.S. 404 ..... 17, 20
Michigan v. *United States*, stay denied, No. A-84 (Aug. 4, 1980) 10
Montana v. *United States*, 440 U.S. 147 16
Ottawa & Chippewa Indians v. *United States*, 42 Ct. Cl. 240 19
People v. *LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 ..... *passim*
Red Lake Band v. *United States*, 7 Ind. Cl. Comm. 576 18

Cases—Continued Page

Red Lake Band v. *United States*, 20 Ind. Cl. Comm. 137 18
Washington v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 ..... 8, 16, 20

Treaties, statute, regulations, and rules:

Treaty of March 28, 1836, 7 Stat. 491 ..... 3, 4
Article First, 7 Stat. 491 17
Article Fourth, 7 Stat. 492 19
Article Eighth, 7 Stat. 494 19
Article Thirteenth, 7 Stat. 495 ..... 4, 17
Treaty of July 31, 1855, Article 3, 11 Stat. 624 ..... 5, 18, 19, 20
Indian Reorganization Act, 25 U.S.C. 476 18
25 C.F.R. Part 256:
Section 256.41(e) 7
Section 256.43(a) 7
Section 256.45(a) 7
Section 256.46(a) 7
Section 256.46(b) 7
Section 256.46(c) 7
Section 256.46(h) 7
Section 256.46(j) 7
Section 256.46(j)(2) 7
Fed. R. App. P.:
Rule 3 12
Rule 4 12
Rule 41 12
Fed. R. Civ. P. 65 11

Miscellaneous:

44 Fed. Reg. 65747 (1979) 6
45 Fed. Reg. 28100 (1980) 6
46 Fed. Reg. 34 (1981) 10

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-549

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The July 10, 1981 order of the court of appeals (Pet. App. 311a-315a) is reported at 653 F.2d 277. The May 28, 1980 order of the court of appeals partially remanding the case to the district court (Pet. App. 292a-297a) is reported at 623 F.2d 448. Various orders of the court of appeals concerning motions for a stay (Pet. App. 204a-222a, 223a-225a, 226a-228a, 298a-299a, 300a-301a, 302a-305a and 306a-308a) are unreported.

The May 7, 1979 opinion of the district court (Pet. App. 18a-203a) is reported at 471 F. Supp. 192. The May 9, 1980 opinion of the district court on the State's motion for a stay pending appeal (Pet. App. 229a-291a) is reported at 505 F. Supp. 467. The August 18, 1981

opinion of the district court following the court of appeals' most recent order (Pet. App. 316a-324a) is reported at 520 F. Supp. 207.

JURISDICTION

The order of the court of appeals was entered on July 10, 1981. The petition for a writ of certiorari was filed on September 16, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Background.* This case concerns the right of the respondent Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians, two recognized Michigan Tribes comprised of Ottawa and Chippewa Indians, to fish in certain areas of the upper Great Lakes and the power of the State of Michigan to regulate fishing by the Tribes.

Since before the arrival of Europeans, the Ottawa and Chippewa Indians have fished in the upper Great Lakes for lake trout, whitefish, and other species, using gill nets. Pet. App. 65a-70a. In time, of course, the fishery came to be shared with non-Indian settlers. By the 1950's, lake trout had been eliminated in Lakes Huron and Michigan and all but the western portions of Lake Superior, due to overfishing and introduction of the sea lamprey. Pet. App. 218a, 247a. Although whitefish also were harmed, the whitefish survived and its population is now self-sustaining.

Beginning in the early 1960's, efforts were begun to reintroduce lake trout in areas where they had become extinct. However, with the exception of a small part of Grand Traverse Bay in Lake Michigan and certain portions of Lake Superior, the stocking program—largely financed by the federal government (Pet. App. 246a)—has not succeeded in establishing reproducing populations of lake trout. *Id.* at 252a. Thus, almost all lake trout in the relevant waters of the Great Lakes have been planted. *Id.* at 245a.

Although lake trout were once the mainstay of Michigan's commercial fishing industry, the State decided in the 1960's to devote lake trout to sports fishing. One difficulty in accomplishing such an allocation, however, is that gill nets used for commercial fishing, even when intended to target only whitefish, also ensnare some lake trout. For this reason, the State banned the use of gill nets, and State-licensed whitefish fishermen were forced to convert to other gear that would enhance the possibility of releasing lake trout. Pet. App. 246a-247a. The gill net is particularly important to the Indian fishery, however, because it is "an inexpensive, efficient method of taking fish, well suited to a fishery made up of individuals with only limited capital on which to base their efforts to make a livelihood" (Pet. App. 249a). The instant suit was precipitated by the State's efforts to apply its prohibition against gill net fishing to Indians.

The United States brought this action in 1973 in its own behalf and in behalf of the Bay Mills Indian Community to establish that the Ottawa and Chippewa's right to fish in the Great Lakes had been confirmed by the Treaty of March 28, 1836 (7 Stat. 491; Pet. App. 1a-8a) and continues to the present day. The complaint alleged that the State of Michigan had been interfering with the treaty-based right of the Bay Mills Indian Community to fish in Lake Superior by enforcing State fishing laws against members of the Community and that the health and economic well-being of Indian families were seriously affected by the sharp reduction in the availability of the fish that had been a traditional source of food for their subsistence and income. Pet. App. 325a-326a. The complaint was later amended to assert claims on behalf of respondent Sault Ste. Marie Tribe and to establish treaty-based fishing rights in other areas of the Great Lakes as well. *Id.* at 25a-26a.[1]

---

[1] The two Tribes were also permitted to intervene. Pet. App. 25a-26a. Much later, the Grand Traverse Band of Ottawa and Chippewa Indians, a newly acknowledged tribal group, was permitted to intervene as a plaintiff.

2. *The Michigan Supreme Court's Decision In People* v. *LeBlanc.* Before the district court ruled on the legal issues presented, the Supreme Court of Michigan considered the very same issues in another case involving the State. One of the incidents of the enforcement of State fishing laws against the Indians, to which the United States referred generally in its complaint in the present case, was the State prosecution of one A.B. LeBlanc, a Chippewa Indian who was an enrolled member of the Bay Mills Indian Community. LeBlanc had been arrested in September 1971 on Lake Superior by a conservation officer of the Michigan Department of Natural Resources for fishing commercially without a State license and for fishing with a device—a gill net—that was illegal under State law. He was convicted on both counts. The Supreme Court of Michigan held, however, that LeBlanc was exercising fishing rights protected by the 1836 Treaty, and it therefore affirmed the State court of appeals' reversal of LeBlanc's conviction for fishing without a State license. See *People* v. *LeBlanc*, 399 Mich. 31, 35, 248 N.W.2d 199, 201 (1976).

The Michigan Supreme Court concluded (399 Mich. at 38-39, 248 N.W.2d at 203) that, although the Ottawa and Chippewa had ceded territory in the Upper and Lower Peninsulas of Michigan and adjacent Great Lakes waters to the United States, the Indians had reserved their fishing rights in the ceded territory by virtue of Article Thirteenth of the Treaty (7 Stat. 495), which provides:

> The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

The Court observed that the record before it clearly established that fishing, including commercial fishing, was central to the Chippewa way of life at the time of the 1836 Treaty. Accordingly, the Court reasoned that the stipulation for "the other usual privileges of occupancy" was understood by the Indians to include the right to

fish and that, under accepted canons of construction, the Treaty should be so construed. 399 Mich. at 40-43, 248 N.W.2d at 204-205.

The Michigan Supreme Court also rejected the argument that the fishing rights reserved by the 1836 Treaty were abrogated by Article 3 of the Treaty of July 31, 1855 with the Ottawa and Chippewa. 11 Stat. 624; Pet. App. 9a-17a. That Treaty, *inter alia*, reserved certain lands from public sale for bands of Ottawa and Chippewa Indians and provided for the payment of certain monies to them. Article 3 of the 1855 Treaty released the United States from "liability" on account of former treaty stipulations by providing that certain grants and payments provided in the 1855 Treaty were in lieu and satisfaction of all "claims" for land, money, or other things. After examining the negotiating history of the 1855 Treaty, the Michigan Supreme Court concluded that Article 3 was addressed to the perceived failure of the United States to fulfill certain monetary and other promises in treaties going back as far as 1795. The Court found "not the slightest indication" in the minutes of the negotiations that the 1855 Treaty would affect fishing rights reserved under the 1836 Treaty (399 Mich. at 55, 248 N.W.2d at 211) and that so to read Article 3 of the 1855 Treaty "would conflict not only with the rules of construction mandated for Indian treaties, but also the clear intent of the parties" (399 Mich. at 53, 248 N.W.2d at 210).

Finally, the Michigan Supreme Court remanded for further proceedings LeBlanc's conviction for fishing with a gill net, concluding that the application of State law and LeBlanc's conviction under it could be upheld only if the State showed that application of the prohibition to the Chippewa is nondiscriminatory and necessary for the preservation of the fish protected. 399 Mich. at 64, 248 N.W.2d at 215. The State did not petition this Court for a writ of certiorari to review the final judgment of the Michigan Supreme Court reversing LeBlanc's

conviction for fishing without a State license and the underlying holding that the 1836 Treaty reserved a fishing right to the Indians that continues to the present day. Nor, we are informed, did the State seek to demonstrate on remand to the State trial court that its general prohibition against gill net fishing could be applied to Indians exercising treaty fishing rights under the standards announced by the Michigan Supreme Court.

3. *The District Court's Decision.* Following discovery and trial in the instant case, the district court, on May 9, 1979, rendered an exhaustive opinion agreeing with the State Supreme Court's holding in *People* v. *LeBlanc*, *supra*, that the Tribes have the right under the 1836 Treaty to fish in the specified waters of Lakes Superior, Michigan and Huron and that this right was not terminated by the 1855 Treaty. Pet. App. 18a-203a. Unlike the Michigan Supreme Court, however, the district court concluded, on the basis of the particular language and negotiating history of the treaties, that the State could not regulate Indian fishing under the 1836 Treaty. Pet. App. 166a-177a. The State appealed this declaratory judgment to the Court of Appeals for the Sixth Circuit.

4. *The Secretary's Regulations.* After the district court issued its opinion and while the appeal was pending, the Secretary of the Interior and the respondent Tribes entered into a memorandum of understanding under which the Tribes, in consultation with the U.S. Fish and Wildlife Service and the Michigan Department of Natural Resources, were to develop a comprehensive set of joint regulations governing the exercise of the treaty fishing rights in the interest of conservation. The Tribes developed the regulations and the Department of the Interior promulgated them as federal regulations on November 15, 1979, with certain changes resulting from the Department's own review and other changes suggested by the Michigan Department of Natural Resources, following consultation. 44 Fed. Reg. 65747. The regulations subsequently were revised on April 28, 1980. 45 Fed. Reg. 28100.

As amended, the regulations required that Indians exercising treaty fishing rights make timely reports of their catch to the Bureau of Indian Affairs, which would in turn furnish the reports to the Michigan Department of Natural Resources and the U.S. Fish and Wildlife Service. 25 C.F.R. 256.45(a). The regulations prohibited commercial and subsistence treaty fishing with nets in certain areas and barred all commercial fishing in another area. 25 C.F.R. 256.46(a) and (b). Still other areas were designated as sanctuaries and were closed to treaty fishing of any type until 50 % of the total population of lake trout in the areas consisted of naturally reproduced fish—provided that the State barred fishing in the same areas by non-treaty fishermen. 25 C.F.R. 256.46(c). And all treaty fishing was to be restricted to the amount yielding no more than the total allowable catch for each species and area, as determined by an Ad Hoc Technical Working Group consisting of biologists representing the State and federal governments and the Tribes. 25 C.F.R. 256.46(j).

Although the use of gill nets was permitted, the regulations restricted the depth of such fishing and the size of the mesh, in order to protect the fishery. 25 C.F.R. 256.46(h). Moreover, the regulations expressly prohibited treaty fishermen from target fishing for lake trout, although, subject to specific limitations and overall quotas, they permitted the retention of lake trout incidentally taken in the course of commercial fishing for other species. 25 C.F.R. 256.46(j)(2).[2] Finally, the regulations provided for their direct enforcement by any enforcement agent of the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, and the Tribes. 25 C.F.R. 256.41(e) and 256.43(a).

---

[2] The regulations provided that if lake trout exceeded 20 % of the total weight of a net lift, the individual making the lift could not set nets in the same grid area for a period of ten days. In addition, incidental retention of lake trout was not permitted when the total allowable catch for lake trout in the ceded waters had been attained for that year. 25 C.F.R. 256.46(j).

5. *The District Court's Denial of a Stay Pending Appeal.* On May 9, 1980, the district court, in a thorough opinion, denied the State's application for a stay to permit the State to regulate treaty fishing pending appeal. Pet. App. 229a-291a. The district court first noted that the status quo in this litigation had been that the State had *not* regulated treaty fishing, based on the State's representation in 1977 that it would not attempt to apply its laws to Indian fishermen while this suit was pending. Pet. App. 233a. Thus, the court reasoned, the requested stay would alter, not preserve the status quo, as in the case of the typical stay. *Id.* at 231a-234a.

The court also undertook a detailed, zone-by-zone assessment of the evidence concerning Indian fishing (Pet. App. 254a-281a) and concluded that "[t]he State's evidence for each of the statistical zones reveals that it has utterly failed to show that Indian fishing has irreparably harmed lake trout, whitefish and other targeted species in the Michigan waters of the Great Lakes" (*id.* at 280a). Moreover, the court reasoned that because almost all lake trout in the Great Lakes were planted in any event (Pet. App. 244a-245a), the State's "conservation" rationale for regulating Indian fishing was not one of preserving the run and natural reproduction of fish for Indians and non-Indians alike, as in the Northwest fisheries involved in the *Puyallup* cases and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), but rather one of maintaining the level of stocked trout at the maximum level and "conserving" them entirely for sports fishermen, to the exclusion of Indians. Pet. App. 234a-253a, 280a-281a. Such an allocation of the species entirely to sports fishermen, the district court concluded, was discriminatory and inconsistent with this Court's decision in *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973).

Finally, the district court found that the detailed regulatory program adopted by the Tribes and the Secretary would be adequate to protect fishery resources in the

future, particularly in view of their provision for flexibility from year to year (Pet. App. 282a-287a), and, conversely, that the State "did not * * * demonstrate that gill nets cannot be so regulated as to provide the necessary protection" (*id.* at 287a).

6. *The Court of Appeals' Orders.* a. On May 28, 1980, the court of appeals, after hearing oral argument on the merits, issued an order expressing the tentative view that the Michigan Supreme Court's decision in *People* v. *LeBlanc* correctly stated the applicable standard governing State regulation of gill net fishing by Indians. Pet. App. 294a-295a. However, it remanded for the district court to determine whether, if the State otherwise would have regulatory authority over Indian fishing, that authority had been preempted by the Secretary's regulations. *Id.* at 296a-297a.[3]

b. Two days later, on May 30, 1980, Judge Merritt, sitting alone, granted the State's application for a stay of the district court's judgment pending appeal, thereby permitting state regulation of the Tribes' fishing. Pet. App. 302a-305a. Judge Merritt did not have before him briefs of either the United States or the Tribes responding to the State's stay application, because motions to extend the time within which to file a response were then pending before the court of appeals. Judge Merritt's order did not mention the federal regulations that had been the subject of the court of appeals' remand order two days earlier or explain why Judge Merritt disagreed with the district court's extensive evaluation in its May 9, 1980 opinion of the factors bearing on the State's request for permission to regulate Indian fishing pending appeal. Moreover, although the State had sought a stay only with respect to certain areas in the Great Lakes, Judge Merritt's stay permitted apparently unlimited State regula-

[3] The district court held a series of hearings on this question, but ultimately did not decide the question because the federal regulations expired on May 11, 1981, thereby rendering the preemption issue moot. See pages 10-11 and note 9, *infra*.

tion—including a flat ban on gill netting—throughout the treaty fishing area.

c. The United States and the Tribes moved for reconsideration of Judge Merritt's order. After a hearing, a panel of the court of appeals modified that order on July 16, 1980. Pet. App. 306a-308a. In the latter ruling, the appellate court held that during the pendency of the litigation, Indian treaty fishing would be governed "by the comprehensive regulations issued on this subject by the Secretary of the Interior" (Pet. App. 307a), although the court of appeals provided that these regulations also could be enforced by personnel of the State of Michigan who were authorized to enforce the State's fishing laws (*ibid.*). The State applied to this Court for an order vacating the Sixth Circuit's order modifying the stay, but that application was denied by Justice White on August 4, 1980. *Michigan* v. *United States*, No. A-84.

d. The Secretary's original regulations were to have expired on May 11, 1981, by which time it was anticipated that new regulations governing treaty fishing during the 1981 season would be promulgated. See 46 Fed. Reg. 34 (1981). On April 21, 1981, however, the Secretary sent a letter to the Governor of Michigan and the Tribes announcing his decision not to extend the federal regulations beyond the May 11, 1981 expiration date. Pet. App. 309a-310a. The Secretary invited the State and the Tribes to designate representatives to meet in an effort to develop a consensus management program for the preservation of the fish stock that would recognize the concurrent responsibilities of the State, the Tribes, and the Department of the Interior. He also explained that in the absence of federal regulations, and during the period until a consensus management program was developed, it was his view that the Michigan Supreme Court's decision in *People* v. *LeBlanc* appeared to correctly state the law applicable to Indian fishing.

In response to the Secretary's letter, the State developed regulations governing the exercise of the Indians'

treaty fishing rights that permitted some gill netting. On April 30, 1981, the State moved the court of appeals to modify its previous stay to provide that during the pendency of the appeal, Indian fishing would be subject to the recently developed State regulations (Pet. App. 320a).

On July 10, 1981, after further briefing, the court of appeals issued the order (Pet. App. 311a-315a) that is the subject of the present petition for certiorari. On the merits, the court held that the 1836 Treaty guaranteed the Indians fishing rights that continue to the present day. Pet. App. 312a-313a. The court further held that these rights are subject to State regulation under the principles outlined in *People* v. *LeBlanc*, *supra*. Pet. App. 313a. Because the parties had not introduced evidence on the latter issue, however, the court of appeals concluded (*ibid.*) that the State had not yet carried its burden of establishing the need for State regulation. Accordingly, the court declined to approve and put into effect on an interim basis the Indian fishing regulations recently adopted by the State. Instead, the court concluded that the comprehensive regulations of the Secretary, which had been adopted by the Tribes, would remain in effect as the interim rules regarding gill net fishing, subject to modification by the district court as necessary, pursuant to Fed. R. Civ. P. 65. Pet. App. 314a.[4] In addition, the court directed the district court to determine, after a hearing on remand, whether the State had demonstrated that State regulation of gill net fishing was necessary under the standards announced in *LeBlanc* and the Sixth Circuit's own opinion.

7. *The Proceedings in District Court on Remand.* Following the court of appeals' July 10, 1981 order, counsel for the State of Michigan advised the district court on remand that the State has no present intention of attempting to satisfy the standards set forth in the court

---

[4] The court of appeals relied upon the representations by the United States and the Tribes that the Tribes would "carefully enforce" those rules. Pet. App. 314a.

of appeals' opinion to regulate Indian fishing rights. In view of this representation, the district court, in an opinion dated August 18, 1981 (Pet. App. 316a-323a), announced that it would retain jurisdiction to decide the propriety of any future attempts by the State to impose regulations on treaty fishermen. The court also made clear that it would retain jurisdiction to modify the current interim regulations if the need arises, as the court of appeals had contemplated in its July 10, 1981 order. Pet. App. 322a-323a.

ARGUMENT

The decision below is consistent with the decision of the Michigan Supreme Court in *People* v. *LeBlanc*, which presented the same issues, and with the decisions of this Court respecting the exercise of Indian treaty fishing rights. Review by this Court, especially in the present interlocutory posture of the case,[5] therefore is unwarranted.

---

[5] The State styles its petition as a petition for a writ of certiorari prior to judgment. However, although the court of appeals' July 10, 1981 order was not expressly entitled a "Judgment," it is clear that the court of appeals considered it to be such. This much would seem to be evident from the fact that the court's mandate issued on August 11, 1981 (Pet. App. 315a); under Fed. R. App. P. 41, the mandate is to issue 21 days *after* judgment. But if there were any doubt initially in this regard, it was eliminated by the court of appeals' response to an August 26, 1981 letter from counsel for the State inquiring whether jurisdiction remained in the court of appeals, pursuant to previous remand orders, to review the district court's August 18, 1981 order. Counsel for the State expressed the view that the court of appeals had retained jurisdiction when it remanded the case to the district court and accordingly urged the court of appeals to act expeditiously to render a "final decision" on the issues raised by the State's appeal. By letter dated September 21, 1981, the court of appeals, through the clerk's office, informed the State that its July 10 order had been "dispositive of the issues pending before the Court" and that if the State wished to seek review of the district court's August 18 order, it should follow the regular procedures for taking an appeal pursuant to Fed. R. App. P. 3 and 4. The State has not sought appellate review of the district court's August 18 order.

1. Perhaps recognizing that the legal issues in this case do not warrant review (see pages 16-23, *infra*), the State argues as a threshold matter (Pet. 10-15) that the Court should grant certiorari to review the procedures followed below. This suggestion is wholly without merit.

The State expresses consternation that the court of appeals issued its July 10, 1981 order "without deciding the merits of the issues raised by [the State's] appeal" (Pet. 14; see also *id.* at 11)—those issues being "whether there is an Indian treaty fishing right and whether the State has any authority to regulate the exercise of that right" (*id.* at 14). But the State's assertion that the court of appeals did not decide these issues is refuted by the very language of the July 10, 1981 order. As to the first issue, the court of appeals explicitly held that "[t]he treaty-guaranteed fishing rights preserved to the Indians in the 1836 treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights" (Pet. App. 312a). And as to the second issue, the court of appeals held that "[t]he right of the Indians to engage in gill net fishing is not absolute" and that "[i]n the absence of federal regulation, that right is subject to the type of state regulation outlined by the Michigan Supreme Court in *People* v. *LeBlanc*" (Pet. App. 313a).[6] See also note 5, *supra*. To be sure, the court of appeals did not write extensively. But this may be explained by the *State's* own request for expedited consideration. See note 7, *infra*.

Nor may the State complain of the court of appeals' failure to approve the specific regulations the State had recently developed governing Indian treaty fishing. The

[6] Thus, although the State expresses the view (Pet. 10, 12) that it is impossible to determine whether the district court's decision has been affirmed, modified, or reversed, it is clear that the court of appeals *affirmed* the district court's holding that the Tribes have treaty-guaranteed fishing rights, *reversed* the district court's holding that the State may not regulate the exercise of those rights under any circumstances, and remanded for further proceedings on the latter issue.

State argued to the court of appeals that the only issue involved on appeal was the existence of *any* authority in the State to regulate Indian fishing and that "the question of the validity of particular enactments"—presumably including the temporary regulations—"is premature" (Supp. Br. 23) and "not yet at issue" (*id.* at 25). The State argued instead that if the court of appeals concluded that there was room for some State regulation and agreed that *People* v. *LeBlanc* controlled, the validity under *LeBlanc* of the application of any particular provision of State law to treaty fishing should be decided in the course of an enforcement action brought against an Indian in State court. Supp. Br. 23, 25. This was, of course, the very approach the State failed to pursue in *LeBlanc* itself, despite the Michigan Supreme Court's invitation.

In any event, the court of appeals scarcely can be faulted for rejecting the State's suggestion that it defer to the State courts. The *entire controversy* in the present case, which the State has vigorously litigated, concerns the extent, if any, to which the State may ban the use of gill nets by Indians. At this late stage of the proceedings, and in view of the district court's and court of appeals' thorough consideration of and familiarity with the factual and legal issues, it was entirely proper for the court of appeals to provide for the district court to retain jurisdiction to decide this critical question.

It must be recalled as well that the present case arose out of the State's efforts in the early 1970's to impose a flat ban on gill net fishing by Indians. The State persisted in that effort when it sought a stay in the district court in 1979 to permit it to regulate Indian fishing and again during the brief period following Judge Merritt's stay order of May 30, 1980. And, most recently, in announcing its temporary regulations developed last April, which permit some gill net fishing by Indians, the State made clear that it still was opposed to the use of large gill nets by anyone and was not retreating from its "ultimate goal" of banning gill nets altogether in large

portions of the Great Lakes.[7] Such a flat prohibition against the Indians' traditional method of fishing in order to devote the taking of lake trout entirely to sports fishermen would appear to be precisely the discriminatory treatment of treaty fishing rights that this Court condemned in *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973). The discrimination would be all the more onerous here, where the ban on gill net fishing would adversely affect the Indians' ability to fish commercially even for whitefish, because nets targeted at whitefish *only incidentally* catch the species the State wants to allocate entirely to non-Indians.

Against this background, it was appropriate for the court of appeals to conclude that, for the time being, protection of treaty fishing rights requires that the application of State law to treaty fishermen be subject, in the first instance, to the scrutiny of the district court.[8] Such an approach is particularly fair as well to the individual Indians who might otherwise be subject to State prosecution for violation of State statutes and regulations the validity of which, as applied to Indians, would not have been determined prior to prosecution.[9]

---

[7] See the State's Emergency Motion to Modify Stay and Request for Immediate Consideration, at 8, and the attached regulations (at 2).

[8] The State argues (Pet. 14) that by virtue of its August 18 decision on remand, the district court has assumed "perpetual jurisdiction" of fishing in the Michigan waters of the Great Lakes. The district court made clear in its August 18 order, however, that it does not want to assume the role of a "perpetual fishmaster" (Pet. App. 323a n.5). But it stated that "the inability of the parties to negotiate, or to litigate in the District Court has meant that this court must continue to assume a role in Great Lakes fishing" (*ibid.*). There is every reason to believe that the district court will reassess its role when circumstances warrant; indeed, its order expressly contemplates that the State may seek to regulate Indian fishing in the future. Pet. App. 322a-323a.

[9] The State also objects (Pet. 11) to the court of appeals' remand order of May 28, 1980 directing the district court to consider the preemptive effect of the Secretary's regulations. See Pet. App.

2. On the merits, the district court and the court of appeals held that the respondent Tribes possess fishing rights in the ceded waters of the upper Great Lakes that were confirmed by the 1836 Treaty with the Ottawa and Chippewa and remain in effect today. This holding—following the district court's exhaustive analysis of the language of the Treaty, its negotiating history, and subsequent events—is in complete agreement with the decision of the Michigan Supreme Court in *People* v. *LeBlanc*. Indeed, the State of Michigan is barred by the doctrine of collateral estoppel from relitigating in this case the issue of the continuing existence of fishing rights under the 1836 Treaty that was resolved against it in *People* v. *LeBlanc*, which the State did not seek to have reviewed by this Court. See *Montana* v. *United States*, 440 U.S. 147 (1979).[10] But collateral estoppel to one side, the agreement of the State and federal courts on these questions renders review by this Court unnecessary (compare *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. at 669-674), particularly because the 1836 Treaty, on which the Tribes' fishing rights are based, affects only lands and waters within the territory of the State of Michigan.

In any event, the conclusion reached by both courts below and by the Michigan Supreme Court in *LeBlanc*

292a-297a. This issue is now moot, because the Secretary's regulations have expired. In any event, contrary to the State's suggestion, the development of comprehensive federal and tribal regulations governing treaty fishing in the interest of conservation was a reasonable approach in view of the district court's holding (later reversed on appeal) that the State could not regulate treaty fishing. The court of appeals' remand order to allow the district court to consider the regulations likewise was reasonable in view of this Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, *supra*, which indicated that regulations of the Secretary promulgated pursuant to his general authority over Indian affairs may preempt state law. See 443 U.S. at 691-692.

[10] The collateral estoppel issue was raised below but was not addressed in the court's opinions and orders.

is correct and is consistent with the decisions of this Court regarding the interpretation of Indian treaties. In Article First of the 1836 Treaty (7 Stat. 491), the Indians ceded to the United States a major portion of the territory that is now the State of Michigan. Included within the ceded area described was not only dry land, but areas "in" the Great Lakes as well (see the map appended to the district court's opinion, Pet. App. 194a). These waters are those in which the Tribes now assert reserved fishing rights.

The State concedes (Pet. 16) that the language in Article Thirteenth of the 1836 Treaty (7 Stat. 495)—in which the Indians stipulated "for the right of hunting on the lands ceded, with the other usual privileges of occupancy"—encompasses fishing as a usual privilege of occupancy of the ceded areas. This concession is well-taken, in view of the central importance of fishing to the Indians at the time of the 1836 Treaty. Pet. App. 65a-72a, 95a-99a, 146a-150a. See also *Menominee Tribe* v. *United States*, 391 U.S. 404, 406-407 (1968); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). But the State nevertheless argues (Pet. 17) that this privilege expired soon after 1836 by virtue of the concluding phrase in Article Thirteenth: "until the land is required for settlement." The State's reliance on this phrase is misplaced. After examining the negotiating history, the district court concluded that the Indians understood that they could continue to fish as long as they lived in Michigan (Pet. App. 103a), which, of course, they continue to do. Moreover, as the district court explained (Pet. App. 153a, quoting *People* v. *LeBlanc*, *supra*, 399 Mich. at 48, 248 N.W.2d at 207):

> Undoubtedly this clause ["until the land is required for settlement"] was intended to protect the right of non-Indians to settle in the ceded area without interference from Chippewa[] claiming "the usual privileges of occupancy," and has limited the rights of the Chippewa[] to hunt. However, the ceded water areas of the Great Lakes have obviously

not been required for settlement, and therefore the fishing rights reserved by the Chippewa[] in these areas have not been terminated.

From the Indians' point of view at the time of the 1836 Treaty, this construction of the treaty is entirely reasonable. The Indians' traditional pattern of existence was to live in coastal villages and fish from spring to fall, and to hunt in the interior in the winter. The Tribes were willing to permit settlement of the land so long as they could continue to live in their traditional way when it did not interfere with that settlement. Pet. App. 97a-105a. It therefore is reasonable to conclude that they retained their reserved right to fish in the traditional manner.

Nor, contrary to the State's passing contention (Pet. 17), did the 1855 Treaty abrogate the Indians' fishing rights.[11] Under the 1836 Treaty, the Indians did not have a permanent land base in Michigan. In addition, the Indians were seeking an accounting of the liabilities of the United States toward them for claims arising under the 1836 and other Treaties. These two factors led to the Treaty. See Pet. App. 112a-115a.

The State apparently relies on Article 3 of the 1855 Treaty (11 Stat. 624), which released the United States from "liability" on account of former treaty stipulations

---

[11] The State also contends (Pet. 17) that even if the 1836 Treaty confirmed fishing rights reserved by the Ottawa and Chippewa, the respondent Tribes may not enforce that right. The State offers no support for this contention. In any event, there is no real dispute that the members of the Bay Mills Indian Community and Sault Ste. Marie Tribe of Chippewa Indians are all descended from the historic Ottawa and Chippewa Tribes. Moreover, these two groups are organized under the Indian Reorganization Act, 25 U.S.C. 476, and have been recognized in decisions of the Indian Claims Commission as beneficiaries of the 1836 Treaty. *Red Lake Band* v. *United States*, 7 Ind. Cl. Comm. 576 (1959); *Red Lake Band* v. *United States*, 20 Ind. Cl. Comm. 137 (1968); *Bay Mills Indian Community* v. *United States*, 26 Ind. Cl. Comm. 538 (1971); Pet. App. 58a-59a.

by providing that certain grants and payments were in satisfaction of all "claims, legal and equitable," for land, money or other things guaranteed under previous treaties. The State's reliance on this Article is misplaced. The "legal" claims concerned items which the United States guaranteed to the Indians but did not furnish. The "equitable" claims arose mostly out of Article Eighth of the 1836 Treaty (7 Stat. 494), under which the United States promised to move the Indians "west of the Mississippi" and furnish them land if they wished to leave Michigan. The Indians, by not moving, saved the government money and believed that the United States should pay that money to them. Article 3 made clear that both of these types of claims were released by the 1855 Treaty. Pet. App. 116a-121a; *People* v. *LeBlanc*, *supra*, 399 Mich. at 52-58, 248 N.W.2d at 209-212. There is not the "slightest indication" (399 Mich. at 55, 248 N.W.2d at 211) in the treaty minutes or elsewhere that the Indians understood that they were also giving up a reserved right to fish or other rights previously secured and enjoyed under prior treaties.

The Court of Claims construed Article 3 of the 1855 Treaty in this very manner in *Ottawa & Chippewa Indians* v. *United States*, 42 Ct. Cl. 240 (1907), upon which the State erroneously relies (Pet. 17). There, the United States had purchased securities for the Ottawa and Chippewa prior to 1855 out of a portion of the annuities due the Tribes under Article Fourth of the 1836 Treaty (7 Stat. 492). The Court of Claims held that the Indians continued to be the beneficial owners of the securities because Article 3 released the United States only from future liability for obligations arising out of prior treaties. The securities, in contrast, were not future obligations of the government but simply property of the Indians, held by the government as trustee as the result of past *fulfillment* of treaty obligations prior to 1855. 42 Ct. Cl. at 246-247. In the same sense, the fishing rights here are not claims against the United States which the United States had failed to fulfill prior to the 1855 treaty,

but were property rights of the Indians already confirmed by the government and enjoyed by the Indians. See *Menominee Tribe* v. *United States*, *supra*, 391 U.S. at 413.[12]

3. There is no merit to the State's final contention (Pet. 18-20) that certiorari should be granted to review the court of appeals' holding regarding the application of State law to treaty fishing rights. The State argued below (Supp. Br. 23, 25) that the Michigan Supreme Court correctly stated the governing legal principles in *People* v. *LeBlanc*, and the State accepts that formulation here. In *LeBlanc*, the court held that the conviction for fishing with a gill net in violation of State law could be sustained only if the States showed that (399 Mich. at 64, 248 N.W.2d at 215):

> (1) the prohibition of the gill net is necessary for the preservation of the fish protected by the regulation;
>
> (2) the application of this prohibition to the Chippewa[] is necessary for the preservation of the fish protected;
>
> (3) and the regulation does not discriminate against the Chippewa[].

This test, including placing of the burden of proof on the State, is fully consistent with the decisions of this Court. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. at 682-685; *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975); *Department of Game* v. *Puyallup Tribe*, *supra*, 414 U.S. at 46-49.

---

[12] The special language in the concluding phrase in Article 3 referring to fishing rights secured to the Sault Ste. Marie Tribe by an 1820 Treaty refers to a fishery that recently had been harmed by the government's construction of a canal and thereby gave rise to a *claim* against the United States that was satisfied by another treaty. See *People* v. *LeBlanc*, *supra*, 399 Mich. at 56 n.14, 248 N.W. 2d at 211 n.14. It does not suggest that the respondent Tribes' fishing rights, which had not given rise to a claim by 1855, were abrogated.

In the present case, the court of appeals explicitly held that the Tribes' right to fish with gill nets "is subject to the type of state regulation outlined by the Michigan Supreme Court in *People* v. *LeBlanc*" (Pet. App. 313a). Because the State had not introduced evidence in support of its new regulations and therefore had not carried its burden of demonstrating a need for them, the court remanded to the district court for the State to make the requisite factual showing under *LeBlanc* and the principles outlined in the court of appeals' decision (*id.* at 314a). The State, however, expressly declined to make the requisite factual showing, just as it had on remand in *LeBlanc*. The State remains free, however, to seek to regulate Indian fishing in the future. And in the interim, Indian fishing is fully subject to the substantive standards established in the regulations formulated by the Secretary in 1979 and 1980 and now adopted by court order and tribal ordinance, subject to such changes as may be proposed by the State or other parties and found by the district court to be necessary in the interest of conservation. State officers may continue to enforce these substantive restrictions (Pet. App. 307a, 314a), as may federal officials, if the need arises. In these circumstances, with a mechanism in place to protect the fishery and the State's interest in the fishery, there is no need for this Court to review the question of State regulation without a factual record on which to consider it.

The State argues (Pet. 18, 20), however, that the court of appeals' formulation of the three-part *LeBlanc* test establishes a more stringent test than that announced in *LeBlanc* itself. The State apparently relies on the court of appeals' statement of the second prong, which provides that State regulation "must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm" (Pet. App. 313a). Unlike the State, however, the Sixth Circuit, which is in the best position to construe its own opinion, made clear that it did not *intend* to depart from the *LeBlanc* test.

In any event, the State has not shown that the two formulations of the second prong differ as a matter of substance. The requirement in the court of appeals' decision that state regulations affecting Indian fishing be the "least restrictive" alternative would appear to be but another way of stating the *LeBlanc* requirement that application of the regulation specifically to treaty fishing must be necessary for the preservation of the species (see also *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975)) or that the State may not impose a *total ban* on gill net fishing by Indians when more limited restrictions will suffice (see *Department of Game* v. *Puyallup Tribe*, *supra*, 414 U.S. at 46-47, 48-49).

Similarly, there is no reason to believe that the court of appeals' reference to preserving fisheries in the Great Lakes from "irreparable harm" was intended to announce a test more stringent than that established under this Court's cases and *LeBlanc*. Rather, this phraseology may have been directed to the State's arguments in district court that State regulation may be appropriate not for the biological purpose of "preserving" a species, but rather in order to satisfy the State's preferred management or economic goal of "conserving" lake trout entirely for sports fishermen. Pet. App. 238a, 240a, 244a-253a, 280a-281a. The incidental taking of any lake trout by Indians using gill nets targeted at other species could be said to "harm" the sports fishery by reducing the lake trout population. The court of appeals may only have intended that something more be shown, in terms of a *biological* impact on the preservation of the species. Pet. App. 238a, 243a, 247a-248a, 253a, 280a-281a. The court of appeals also may have been seeking to take account of another unique feature of this case that was considered by the district court in connection with the question of State regulation: the fact that the species incidentally taken by Indians and sought to be "conserved" by the State is almost entirely planted. Pet. App. 244a, 247a, 253a, 280a-281a.

It is not necessary to speculate further about what the court of appeals might have meant by the language it used in describing the principles applicable in the unique circumstances of this case. It is sufficient for present purposes to note that the State made no effort to meet its burden, whatever it might be, and therefore simply challenges language in the court of appeals' opinion in the abstract. In any event, as explained above, if the State makes a factual record in support of State regulation in the future, there is every reason to believe that the federal courts' review of the State's proposal will be fully consistent with this Court's decisions and the approach that would be taken by the State courts under *LeBlanc*. But if inconsistencies actually materialize at a later date, there will be time enough for this Court to intervene.

CONCLUSION

The petition for a writ of certiorari shoud be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ROBERT L. KLARQUIST
EDWARD J. SHAWAKER
Attorneys

NOVEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359116 689

Opposition

2

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-549

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

State of Michigan, et al.,
Petitioners,

v.

United States of America, et al.,
Respondents.

RESPONDENT TRIBES' BRIEF IN OPPOSITION TO CERTIORARI

Bruce R. Greene,
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colo. 80302
Telephone: 303/447-8760

William Rastetter
Old City Hall
160 East State Street
Traverse City, Mich. 49684
Telephone: 616/947-0122

Daniel T. Green
William J. James

Counsel for Respondent
Indian Tribes

November 1981

QUESTIONS PRESENTED FOR REVIEW

I.

Have the Michigan Supreme Court and the Sixth Circuit Court of Appeals properly concluded that respondent Indian tribes reserved by treaty a right to fish in certain Michigan waters of the Great Lakes?

II.

A. Did the Court of Appeals correctly define the permissible scope of state regulation governing off-reservation treaty fishing?

B. Is this issue ripe for review absent any factual record applying the Court of Appeals' definition?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS BOTH CONCLUDED THAT RESPONDENT TRIBES HAVE A TREATY RIGHT TO FISH IN CERTAIN WATERS OF THE GREAT LAKES	11
A. Under the 1836 Treaty the Tribes Reserved Rights to Fish That Were Not Diminished by the 1855 Treaty.	11
B. The State is Precluded By Operation of Collateral Estoppel From Relitigating the Issue of the Existence of the Tribes' Treaty Fishing Rights . . .	17
II. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS SIMILARLY DEFINED THE SCOPE OF PERMISSIBLE STATE REGULATION OVER THE TREATY FISHERY AND, EVEN IF THEIR STANDARDS DIFFER, THIS ISSUE IS NOT RIPE FOR REVIEW	22

Page

A. There Is No Difference In Substance Between the Standard Prescribed by the Sixth Circuit and the Previous Decision of the Michigan Supreme Court . . 22

B. This Issue Is Not Ripe for Review 25

C. The Treaty Tribes' Self-Regulation Adequately Protects the Fishery Resource 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases:

Antoine v. Washington, 420 U.S. 194 (1975) 23

Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971) 19

Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973) 23

Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974) . . . 14

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 14

Page

Montana v. United States, 440 U.S. 147 (1979) 18, 21

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 19, 21

People v. LeBlanc, 399 Mich. 31, 248 N.W.2d 199 (1976) . . . . passim

Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968). 24

Seufert Brothers Co. v. United States, 249 U.S. 194 (1919) 13

Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969) 24

State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972) 14

United States v. Michigan, 653 F.2d 277 (6th Cir. 1981). . . . passim

United States v. Michigan, 623 F.2d 448 (6th Cir. 1980) . . . 6, 7, 24

United States v. Michigan, 520 F.Supp. 207 (W.D.Mich. 1981) . . . 2

United States v. Michigan, 471 F.Supp. 192 (W.D.Mich. 1979) . . passim

United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) 24

Page

United States v. Wheeler, 435 U.S. 313 (1978) 13

United States v. Winans, 198 U.S. 371 (1905) 13

Washington v. Fishing Vessel Association, 443 U.S. 658 (1979) 13, 19

Winters v. United States, 207 U.S. 564 (1908) 13

Treaties:

Treaty of March 28, 1836 (7 Stat. 491) . . . . . passim

Treaty of July 31, 1855 (11 Stat. 621) . . . . . passim

Rules and Regulations:

25 C.F.R. Part 256 6

44 Fed. Reg. 65747 (1979) 6

45 Fed. Reg. 28100 (1980). 6, 28

46 Fed. Reg. 33 (1981) 7

Rule 42(b), Fed. R. Civ. P. 3

No. 81-549

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

State of Michigan, et al.,
Petitioners,

v.

United States of America, et al.,
Respondents.

RESPONDENT TRIBES' BRIEF IN OPPOSITION TO CERTIORARI

Respondents Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians respectfully submit the following brief in opposition to the petition for certiorari of the State of Michigan.

OPINIONS BELOW

Petitioners identify and include in their appendix numerous district court and circuit court opinions below. While all of these opinions and orders are a part of this litigation, the court of appeals' decision from which review is sought is dated

July 10, 1981, Pet. 311a, and is now reported at 653 F.2d 277 (6th Cir. 1981). The principal district court opinion reviewed by the court of appeals is reported at 471 F.Supp. 192 (W.D.Mich. 1979), Pet. 18a.[1/]

STATEMENT OF THE CASE

In April 1973, the United States filed suit in the western district of Michigan against the State of Michigan seeking a declaration that the Indian parties to the Treaty of March 28, 1836 (7 Stat. 491) reserved a right to fish in certain Michigan waters of the Great Lakes.[2/] Both Bay Mills and the Sault Tribe subsequently petitioned the district court and were accorded status as plaintiff-intervenors.

In order to streamline the litigation,

[1/] The District Court opinion on remand, found at Pet. 316a, has now been reported at 520 F.Supp. 207 (W.D.Mich. 1981).

[2/] A map of the ceded waters wherein the reserved right pertains appears in 471 F.Supp. at 277, Pet. 194a.

the United States and the tribes moved, pursuant to Rule 42(b), Fed. R. Civ. P., to sever three issues for separate trial. On July 30, 1976, the district court entered an opinion and order granting the motion and designating the issues: (i) interpretation of the 1836 treaty to determine whether the Indians reserved fishing rights thereunder; (ii) interpretation of the 1855 treaty (11 Stat. 621) to determine whether any fishing rights reserved under the earlier treaty were abrogated subsequently; and (iii) whether the state possessed any jurisdiction to regulate tribal fishers if treaty reserved fishing rights were determined to exist. See 471 F.Supp. at 218, Pet. 58a.

Prior to trial in this case, the Supreme Court of Michigan decided People v. LeBlanc, 399 Mich. 31, 248 N.W.2d 199 (Mich. 1976), reversing a state criminal conviction of a tribal member fishing in violation of state

law. The Michigan Supreme Court held the Indians had reserved a right to fish under the 1836 treaty that was not abrogated by the 1855 treaty. The state high court further ruled that Michigan could regulate tribal members, but only for legitimate conservation purposes and only so long as the regulation did not discriminate against treaty fishers. The United States and the tribal respondents herein were not parties to the LeBlanc litigation.

After trial in 1978, District Judge Noel P. Fox issued a comprehensive decision, United States v. Michigan, 471 F.Supp. 192 (W.D.Mich. 1979), Pet. 18a, addressed to the three severed issues. The decision examined the historical circumstances surrounding the treaties and the Indians' understanding of them. The court held that the treaty tribes had reserved fishing rights in portions of the Great Lakes pursuant to the express reservation contained in

Article Thirteenth of the 1836 treaty and by implication as well, since the heavy dependence of the Indians on the fishery resource led to the conclusion that the tribes would not have knowingly relinquished the right. Id. at 253-59, Pet. 140a-54a. The district court also concluded that because the modern day tribes had adopted conservation codes, were regulating the activities of their fishing members and were receiving technical assistance from the United States through the Interior Department's Fish and Wildlife Service and Bureau of Indian Affairs, the state's authority to impose its own regulations was preempted by the treaty and by the federal and tribal governments' occupation of the field. Id. at 265-74, Pet. 166a-88a.

The state appealed the district court's decision to the Sixth Circuit Court of Appeals. On May 28, 1980, the court of

appeals entered a per curiam decision remanding the case to the district court to consider in more detail the issue of federal preemption. United States v. Michigan, 623 F.2d 448 (6th Cir. 1980), Pet. 292a. Although the Secretary of the Interior had been regulating tribal fishers under 25 C.F.R. Part 256 prior to the district court's opinion of May 7, 1979, detailed federal regulations governing treaty fishing in the ceded waters were not published until November 15, 1979.[3] The November 1979 regulations were thereafter amended and republished on April 28, 1980.[4] The promulgation of these regulations subsequent to the district court's decision prompted the remand for further consideration of the preemption issue. Also, the May 28, 1980

[3] 44 Fed. Reg. 65747 (1979). The tribes had been regulating treaty fishers under tribal conservation codes for many years prior to the Secretary of the Interior's regulation, see 471 F.Supp. at 248, Pet. 128a.

[4] 45 Fed. Reg. 28100 (1980).

remand decision stated the circuit court's tentative conclusion that:

> [I]n the absence of federal regulations occupying the field, the Supreme Court of Michigan in People v. LeBlanc, supra, has correctly stated the applicable standard governing state regulation of gill net fishing.

Id. at 450, Pet. 297a.

Beginning in the fall of 1980, the district court heard testimony from tribal and Interior Department officials regarding the purposes for the Interior Department's promulgation of the comprehensive treaty fishing regulations. Prior to the conclusion of the remanded proceedings, the Secretary of the Interior issued a letter, dated April 21, 1981 (Pet. 309a), to the Governor of Michigan and the chairmen of the tribes providing notice of his decision not to extend the federal regulations beyond May 11, 1981, the date upon which they expired, see 46 Fed. Reg. 33,

34 (January 2, 1981).[5/]

Immediately thereafter, the court of appeals called for supplemental briefs and reargument of the entire case in response to the state's motion. On July 10, 1981, the court issued the decision that is the subject of the state's petition for certiorari. United States v. Michigan, 653 F.2d 277 (6th Cir. 1981), Pet. 311a. This decision affirmed the district court's interpretation of the treaties, but modified the conclusion that all state regulation of treaty fishers was void ab initio. Instead, the circuit court followed the Michigan Supreme Court's holding in People v. LeBlanc, supra, which permits limited, nondiscriminatory state regulation for legitimate conservation purposes. Id. at 279, Pet. 313a.

[5/] These regulations continue to govern treaty fishing pursuant to the order of the court of appeals dated July 16, 1980, Pet. 307a, and because the respondent tribes have adopted them as tribal law, see 653 F.2d at 279, paragraph 5, Pet. 314a.

SUMMARY OF ARGUMENT

Because the decisions of the Sixth Circuit Court of Appeals and the Michigan Supreme Court are in agreement that respondent Indian tribes reserved fishing rights under the Treaty of March 28, 1836, that were not subsequently abrogated by the Treaty of July 31, 1855, there is no occasion for review of this question by the Court. Furthermore, petitioners are precluded by the doctrine of collateral estoppel from denying the existence of the reserved fishing right previously recognized by the Michigan Supreme Court in People v. LeBlanc, supra.

There is no difference in substance between the decisions of the federal and state courts defining the permissible scope of state regulation over the Indian treaty fishery. Indeed, the appeals court stated, in referring to People v. LeBlanc, supra, that it is "a decision which we

believe accurately states the rule of reason and the principles of federal law applicable to this case." 653 F.2d at 279, Pet. 313a.

To the extent the federal and state courts may differ on this issue, the abstract language of the court of appeals defining the scope of permissible state regulation should only be considered by the Court, if at all, in the context of a record reflecting application of that standard to concrete facts. No such record exists at this time.

There is no justification for petitioners' assertion that review is warranted because of threatened harm to the fishery resource. The comprehensive regulations currently governing tribal members adequately protect the fishery and prevent its depletion.

ARGUMENT

I. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS BOTH CONCLUDED THAT RESPONDENT TRIBES HAVE A TREATY RIGHT TO FISH IN CERTAIN WATERS OF THE GREAT LAKES.

Petitioners contend that the decisions of the district court and court of appeals are inconsistent with the Michigan Supreme Court's decision in People v. LeBlanc, supra, and with decisions of this Court on which the LeBlanc decision is predicated. To the contrary, the most notable aspect of this litigation is the extent to which the Michigan Supreme Court and the federal courts are in complete agreement on the fundamental issues of treaty interpretation and the tribes' fishing rights in the Great Lakes.

A. Under the 1836 Treaty the Tribes Reserved Rights to Fish That Were Not Diminished by the 1855 Treaty.

The Treaty of Washington, dated March 28, 1836 (7 Stat. 491), Pet. 1a, was a treaty of cession made between the United

States and certain amalgamated bands of Ottawa and Chippewa Indians living in the northern portion of the lower peninsula and eastern portion of the upper peninsula of what is now the State of Michigan. The principal purpose for the treaty from the perspective of the United States was to extinguish the Indians' aboriginal title, thereby making vast tracts of land available for the westward movement of non-Indian settlers.

The treaty tribes or bands were heavily dependent upon the natural resources of the area for their livelihood. In particular, the Indians were fishers who utilized the seemingly inexhaustible fishery resource of the Great Lakes. 471 F.Supp. at 221-25, Pet. 65a-74a. The Indians traveled by canoe and utilized gill nets to harvest all species, but especially lake whitefish and lake trout.

When the Indians granted to the United

States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 treaty, they reserved all those rights not specifically conveyed. Washington v. Fishing Vessel Association, 443 U.S. 658, 674-85 (1979); United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978); Seufert Brothers Co. v. United States, 249 U.S. 194, 198 (1919); Winters v. United States, 207 U.S. 564, 576 (1908); United States v. Winans, 198 U.S. 371, 380-81 (1905). Among the reserved rights was their aboriginal right to continue to fish in the ceded waters of the Great Lakes. 653 F.2d at 278, Pet. 312a; 471 F.Supp. at 255-56, Pet. 143a-46a.

In addition to the implied right to fish, the tribes and the United States relied on explicit language in the treaty in support of their claims. Article Thirteenth of the 1836 treaty provides:

The Indians stipulate for the right

> of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.

7 Stat. 495, Pet. 8a. The federal courts and the Michigan Supreme Court agreed that this language constituted an explicit reservation of a right to take fish from the Great Lakes. 471 F.Supp. at 258-59, Pet. 151a-53a; People v. LeBlanc, supra, 248 N.W.2d at 203-04. These holdings are in accord with this Court's decision in Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968) (Treaty of Wolf River setting aside home for Indians "to be held as Indian lands are held..." includes the right to hunt and fish). See also, Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974); State v. Tinno, 94 Idaho 759, 497 P.2d 1836, 1389-90 (1972). Further, both the Michigan Supreme Court and the lower federal courts agreed that the phrase "until the land is

required for settlement" was not intended to limit the Indians' reserved right to fish in the Great Lakes. 471 F.Supp. at 235-38, 258-59, Pet. 97a-105a, 151a-53a; People v. LeBlanc, supra, 248 N.W.2d at 207.

The 1855 treaty (11 Stat. 621), Pet. 9a, was negotiated to address two principal matters: providing permanent homes for the Indians in Michigan and settling claims the Indians had for goods, services and annuities promised by the United States under the 1836 treaty but never delivered. The federal courts concurred with the Michigan Supreme Court that the 1855 treaty had no impact whatsoever on the fishing right reserved by the Indians under the earlier treaty. 471 F.Supp. at 262-65, Pet. 160a-65a; People v. LeBlanc, supra, 248 N.W.2d at 209-12.

The state argued to the Michigan Supreme Court and the lower federal courts that a release clause (Article 3, Pet. 16a)

in the 1855 treaty operated to abrogate rights reserved under the 1836 treaty. The Michigan Supreme Court rejected this contention:

> While it is conceivable that the United States intended "claims...for other things" in the Treaty of 1855 to refer to fishing rights reserved by the Chippewas in the Treaty of 1836, such seems highly unlikely given the complete absence of any discussion of the termination of such rights in the treaty negotiations.
>
> In any case, it is clear that the Chippewas and the Ottawas would not have understood Article Three of the Treaty of 1855 to terminate hunting and fishing rights reserved in the Treaty of 1836 given the absence of any mention of such prospect.

People v. LeBlanc, supra, 248 N.W.2d at 211. The district court's opinion is in accord, 471 F.Supp. at 243-47, 262-63, Pet. 116a-25a, 160a-63a, and the Sixth Circuit upheld this conclusion, 653 F.2d at 278, Pet. 312a.

In summary, the federal courts and the state supreme court, which reviewed and scrutinized exhaustively the treaties

at issue herein, reached identical conclusions. Each ruled that the Indian signatories reserved the right to fish in the waters of the Great Lakes ceded by Article First of the Treaty of 1836. Each ruled that the later Treaty of 1855, negotiated with the same bands as the earlier treaty, did not abrogate in any way the prior reserved right. Since there is no conflict between the decisions of the Sixth Circuit and Michigan's court of last resort and since these courts have interpreted the treaties consistently with decisions of this Court, there is no occasion for review by this Court.

B. The State Is Precluded By Operation of Collateral Estoppel From Relitigating the Issue of the Existence of the Tribes' Treaty Fishing Rights.

Under the doctrine of collateral estoppel, Michigan and its citizens are bound by the resolution of the treaty interpretation issues decided in People v.

LeBlanc, supra. Indeed, it is difficult to imagine a more classic case for application of the doctrine.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979) (citations omitted). It is undisputed that in LeBlanc the Michigan Supreme Court actually and necessarily determined that the Chippewa Indians reserved fishing rights in the 1836 treaty that were not extinguished or affected by the 1855 treaty. That determination is therefore conclusive against Michigan and its citizens in this suit. Further, LeBlanc is binding not only on the state itself, but also on all of its citizens and fishing groups.

Washington v. Fishing Vessel Association, supra, 443 U.S. at 692 n.32.

It is true, of course, that neither the tribes nor the United States were parties to the LeBlanc litigation and that collateral estoppel is being used here offensively, not defensively. It is, however, now firmly settled that non-parties can use collateral estoppel both offensively and defensively so long as the party against whom the estoppel is asserted had a full and fair opportunity to be heard. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979); Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971). There can be no unfairness in holding Michigan bound by the issues actually and necessarily litigated in LeBlanc because: (a) the state filed the case and chose the forum; (b) the state had every incentive to litigage LeBlanc to a successful

conclusion and took its battle all the way to the Michigan Supreme Court; (c) it is likely the state made a calculated decision not to seek review of LeBlanc in this Court; (d) the judgment in LeBlanc was not inconsistent with any previous decision in which the issues were litigated in an adversary context; (e) there are no different or greater procedural opportunities available to the state in this case that were unavailable in LeBlanc; (f) the United States and the tribes will not be unjustifiably rewarded for staying out of the LeBlanc litigation because there was no opportunity for them to intervene in the state court criminal prosecution of an individual Indian; (g) there have been no changes in the relevant and controlling facts; (h) there have been no changes in the controlling legal principles; (i) the questions expressly and definitely presented in this action are the same as

those definitely and actually litigated and adjudged adversely to the state in the state court action; and (j) there are no special circumstances justifying an exception to general estoppel principles. Compare Montana v. United States, supra, 440 U.S. at 155-64; Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 331-33.

For these reasons, petitioners herein are collaterally estopped from relitigating the existence of the tribes' fishing rights under the 1836 and 1855 treaties. Since there are no novel or important collateral estoppel issues presented by this case which make application of the doctrine unfair to petitioners, the use of offensive collateral estoppel by the tribes and United States would preclude reaching the merits of the treaty interpretation issues. Thus, review by this Court is not appropriate.

II. THE MICHIGAN SUPREME COURT AND THE SIXTH CIRCUIT COURT OF APPEALS SIMILARLY DEFINED THE SCOPE OF PERMISSIBLE STATE REGULATION OVER THE TREATY FISHERY AND, EVEN IF THEIR STANDARDS DIFFER, THIS ISSUE IS NOT RIPE FOR REVIEW.

A. There Is No Difference In Substance Between the Standard Prescribed by the Sixth Circuit and the Previous Decision of the Michigan Supreme Court.

The district court held that the state lacked any authority to regulate the exercise of treaty reserved fishing rights. This conclusion was based upon federal preemption arising from the treaties and because the record before the court indicated the tribes were self-regulating effectively. 471 F.Supp. at 270-74, Pet. 178a-88a.

The court of appeals disagreed with the district court and followed the rule established by this Court that states, including Michigan, do have limited authority to regulate the off-reservation exercise of treaty fishing rights. The

appeals court stated:

> The right of the Indians to engage in gill net fishing is not absolute, however. It is subject to a rule of reason. In the absence of federal regulation, that right is subject to the type of state regulation outlined by the Michigan Supreme Court in People v. LeBlanc, 248 N.W.2d 199 (1976), a decision which we believe accurately states the rule of reason and the principles of federal law applicable to this case. As provided in LeBlanc, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

653 F.2d at 279, paragraph 2, Pet. 313a.

Defining the scope of permissible state regulation in substantially similar language, the Michigan Supreme Court relied upon the standard evolved in this Court's decisions in Antoine v. Washington, 420 U.S. 194 (1975); Department of Game v. Puyallup Tribe (Puyallup II), 414

U.S. 44 (1973); Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968); and lower court decisions in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969). People v. LeBlanc, supra, 248 N.W.2d at 212-215.

Petitioners argue that the circuit court's standard for permissible regulation, while purporting to follow LeBlanc, in fact is more strict, Pet. 13. While it is true the appeals court used slightly different language than the state's high court, there is no indication it intended any departure from the standard established by this Court and followed in LeBlanc. Indeed, the Sixth Circuit has consistently referred to the LeBlanc decision as being a correct statement of the applicable principles of federal law. See 653 F.2d at 279, Pet. 313a; 623 F.2d

at 449, 450, Pet. 295a, 296a-97a.

B. This Issue Is Not Ripe for Review.

To the extent there is a difference in the definition of the standard for permissible state regulation of treaty fishers articulated by the LeBlanc court and the Sixth Circuit, the Court ought not review this purported difference in the absence of a record applying the standard.

Under the Sixth Circuit's July 10, 1981 decision and remand, the state is now empowered to invoke the district court's jurisdiction for approval of specific state regulation of treaty fishers. 653 F.2d at 279, paragraph 6, Pet. 314a. The appeals court declined to determine whether any proposed state regulations conformed to the federal standard because the state had not yet introduced any evidence in the district court to support the legitimate conservation need and

non-discriminatory effect of such regulations. Id. at 279, paragraph 4, Pet. 313a-14a.

Shortly after the court of appeals' decision, the state informed the district court and the parties that it had no present intention to offer any regulations to the district court for approval. Pet. 322a-23a. Thus it is possible the abstract standard for permissible state regulation defined by the appeals court will never be applied in the future.

Judicial review is not appropriate until the state proposes regulations and submits proof in support of the need for such regulation. Any alleged difference in the circuit court's definition should only be considered by the Court in the context of a specific case or controversy, and then only after the district court and court of appeals have first considered the matter.

C. The Treaty Tribes' Self-Regulation Adequately Protects the Fishery Resource.

The tribes regulate their fishers under joint tribal regulations and conservation codes, and any changes in these regulations must first be submitted to the district court for approval. 653 F.2d at 279, paragraph 5, Pet. 314a. The tribes utilize fishery biologists under their own employ and those from the Interior Department's Fish and Wildlife Service to advise them regarding the condition of the fish stocks and the need to adjust tribal regulations to manage and protect the resource.

The tribal regulations are comprehensive, restricting time, place and manner of treaty fishing. There are lake-wide spawning closures and limits on the total allowable harvest for each critical species. Depth and size restrictions

govern the use of gill nets. The regulations impose detailed reporting requirements on licensed fishers; and certain conditions must be met before annual licenses are issued. See generally 45 Fed. Reg. 28100 (April 15, 1980).

The regulations are enforced in tribal court by tribal and Interior Department conservation officers. Further, pursuant to an order of the Sixth Circuit, Pet. 307a, Michigan Department of Natural Resources' conservation officers are empowered to enforce tribal regulations.

Because of this comprehensive system of regulation and enforcement, the fishery resource will not suffer depletion. The tribes have regulated their members for many years and, if their regulations continue to be successful, the application of state regulations may never be necessary. Moreover, if the state believes the resource is endangered under tribal

regulation, it is free at any time to submit its own regulations to the district court for approval.

CONCLUSION

There is no conflict between the Michigan Supreme Court and the Sixth Circuit Court of Appeals over treaty interpretation and the existence of the right to fish in the Great Lakes. Similarly, both courts are in substantial agreement on the scope of permissible state regulation. Even if there were differences in the prescribed scope, the Court should not review the standard in the absence of a record reflecting the state's effort to support the legitimate need for its regulations. Although the state has no present intent to invoke the district court's jurisdiction, it is free to do so anytime if it believes the treaty fishing is harming a resource. In the meantime, tribal regulations protect

and preserve the fishery resource. For these reasons, the tribal respondents urge the Court to deny the writ.

Dated: November 1981

Respectfully submitted,

Bruce R. Greene
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
303/447-8760

William Rastetter
Old City Hall
160 East State Street
Traverse City, Michigan 49684
616/947-0122

Daniel T. Green
206 Greenough Street
Sault Ste. Marie, Mich. 49783
906/632-3481

William J. James
536 Bingham Avenue
Sault Ste. Marie, Mich. 49783
906/632-3361

Counsel for Respondent
Indian Tribes